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No.

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5241

WILLIAM G. MOORE, JR., APPELLEE

v.

MICHAEL HARTMAN, ET AL., APPELLANTS

Argued: Sept. 15, 2004
Decided: Nov. 9, 2004

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

Qualified immunity generally shields public officials from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In this case, appellee William G. Moore, Jr., claims that government officials—in particular six postal inspectors—pursued criminal charges against him in retaliation for his political activities. The postal inspectors argue that even though the criminal charges against Moore were dismissed, they enjoy qualified immunity because probable cause supported the prosecution. At the time of

Moore's indictment, however, the clearly established law of this circuit barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so. Because a reasonable jury could find on the basis of the record before us that Moore's prosecution violated this standard, we reject the inspectors' immunity defense and affirm the district court's denial of summary judgment on this issue.

I.

In the mid-1980s, William G. Moore, Jr., served as CEO of Recognition Equipment, Inc. ("REI"), a company specializing in optical scanning technology. Among other products, REI produced a multi-line optical character reader ("MLOCR")—a device capable of mechanically interpreting multiple lines of text. Encouraged by some $50 million in research and development funding REI had received from the U.S. Postal Service ("USPS"), Moore urged Postmaster General ("PMG") William F. Bolger to consider purchasing REI's MLOCRs to aid the USPS in automating its mail sorting functions. Moore was disappointed, however. Since the late 1970s, the USPS had been pursuing an initiative, known as "Zip + 4," to add four digits to existing five-digit zip codes; with the new nine-digit codes, efficient automatic sorting required scanning only a single line of text, rather than the multiple lines read by REI's device. Accordingly, PMG Bolger—a staunch supporter of Zip + 4—announced in late 1983 that the USPS would stick with single-line optical character readers ("SLOCRs") instead of using REI's product.

Zip + 4, however, was politically controversial. "Bureaucratic arrogance," one senator called it. Another urged the USPS to "Zap the ZIP!!" In December 1981, the House Committee on Government Operations accused the USPS of "repeatedly overstat[ing] and misrepresent[ing] the benefits that might accrue" due to the nine-digit codes. And despite PMG Bolger's testimony that prohibiting Zip + 4 would "cut the Postal Service from the only major opportunity it now has to meet all its obligations at controlled costs," Congress imposed a two-year moratorium on Zip + 4 in July 1981 and barred the USPS from making the nine-digit codes mandatory.

Chagrined by PMG Bolger's procurement of SLOCRs, Moore plunged REI into the political fray. To members of Congress and USPS governors, he argued that REI's MLOCRs were superior technology because they were not dependent on Zip + 4. He also pointed out that unlike SLOCRs, REI's MLOCRs were American-made. USPS managers reacted angrily: PMG Bolger told Moore to "back off," and another top official told Moore REI would never receive USPS business. Moore's position nevertheless gained influence. Several members of Congress pressed REI's case with the USPS Board of Governors, and Representative Martin Frost, working closely with Moore, introduced legislation (later withdrawn) to force USPS to buy American-made MLOCRs. More important, the General Accounting Office (now the Government Accountability Office) and the Office of Technology Assessment ("OTA") produced reports concluding that the USPS's operational losses due to the use of SLOCRs rather than MLOCRs exceeded one million dollars a day. The OTA report attributed the procure-

ment of SLOCRs to unrealistic expectations for Zip + 4, noting that while MLOCR technology might have been inferior in the past, it was now "fully competitive," making it unreasonable for USPS to continue using single-line technology despite low usage of the nine-digit codes.

Responding to these pressures, the USPS Board of Governors voted in July 1985 to make a "mid-course correction" and switch to multi-line technology. Although this was just what Moore's media and lobbying campaign had sought, the result turned out unhappily for Moore and his company.

In the months following the mid-course correction, the USPS Postal Inspection Service uncovered two criminal schemes relating, at least incidentally, to REI. The first, a kickback arrangement, involved a USPS Governor, Peter Voss, and a consulting firm, Gnau & Associates, Inc. ("GAI"), that REI had hired in connection with its lobbying campaign. As it turned out, GAI was paying Voss for referrals, and three GAI officers—John Gnau, Jr., Michael Marcus, and William Spartin—had agreed to share the proceeds of the REI contract with Voss. The second scheme, the details of which are unimportant to this case, involved Spartin's and REI's role in the search for a new PMG. In connection with these two schemes, Voss, Gnau, and Marcus pleaded guilty to criminal charges, while Spartin accepted immunity in exchange for cooperation.

Having uncovered these crimes, the postal inspectors sought to determine whether anyone at REI had participated in them. Following an investigation we describe in more detail below, a grand jury returned a seven-count indictment against Moore, REI, and REI's Vice President for Marketing, Robert Reedy, in

October 1988. The case went to trial a year later, but six weeks into the proceedings at the close of the government's case, the district court issued a judgment of acquittal. *See United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 587-88, 602 (D.D.C. 1989). Emphasizing a "complete lack of direct evidence to suggest the Defendants knew of the illegal payoff scheme," *id.* at 596, the district court concluded, "The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminating evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants." *Id.* at 587-88.

Exonerated of the criminal charges, Moore set about obtaining civil damages for the harm to his life and career. Joined by his wife, Moore began by filing a complaint in the Northern District of Texas asserting constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against the prosecutor and six postal inspectors (one of whom is now deceased). Shortly thereafter, the Moores filed a second complaint, also in the Northern District of Texas, seeking recovery from the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. The Texas federal court dismissed Mrs. Moore's claims for lack of standing; found that absolute immunity barred the claims against the prosecutor; and, citing qualified immunity, threw out a Fifth Amendment abuse-of-process claim against the inspectors. *Moore v. Valder*, No. 91-2491 (N.D. Tex.

Sept. 21, 1992). The court transferred the remaining claims to the U.S. District Court for the District of Columbia, which dismissed the entire suit. *Moore v. Hartman*, No. 92-2288, 1993 WL 405785 (D.D.C. Sept. 24, 1993).

Reviewing the decisions of the D.C. and Texas district courts, we reinstated certain claims against the prosecutor and the United States along with a retaliatory prosecution *Bivens* claim against the postal inspectors. *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) ("*Moore I*"). On remand, the district court denied the inspectors' motion for summary judgment, allowing limited discovery on the retaliatory prosecution claim. As to the prosecutor and the United States, however, the court again dismissed Moore's claims. *Moore v. Valder*, No. 92-2288 (D.D.C. Feb. 5, 1988). Moore appealed a second time, and we affirmed the district court's ruling except as to one FTCA claim not relevant here. *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000) ("*Moore II*").

The inspectors, setting up the issue we now face, again sought summary judgment on the retaliatory prosecution claim, this time on the theory that they enjoy qualified immunity because probable cause supported Moore's prosecution. In the alternative, the inspectors argued that the record contained insufficient evidence of retaliatory motive. The district court denied the inspectors' motion in the following one-paragraph order:

> Upon consideration of the motion of defendants, United States and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are

material facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony as to a key prosecution witness.

The inspectors now appeal, arguing, as they did in the district court, that they enjoy qualified immunity because they had probable cause to pursue the criminal charges against Moore.

II.

Before addressing the merits of the inspectors' qualified immunity claim, we must consider whether we have jurisdiction over this interlocutory appeal. Though 28 U.S.C. § 1291 permits us to hear appeals only from "final decisions" of the district court, denial of a claim of qualified immunity falls within the "small class" of collateral orders subject to immediate appeal under that statute despite the absence of a final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 530, 105 S. Ct. 2806, 2814-15, 86 L. Ed. 2d 411 (1985). The reason for this is simple: appeal after trial cannot remedy an erroneous denial of qualified immunity, since by then the defendant will already have suffered the burdens of litigation the immunity is intended to prevent. *See id.* at 525-30, 105 S. Ct. at 2814-18; *Int'l Action Ctr. v. United States*, 365 F.3d 20, 23 (D.C. Cir. 2004). As Moore observes, however, the collateral order doctrine applies only "to the extent [the denial of qualified immunity] turns on an issue of law." *Mitchell*, 472 U.S. at 530, 105 S. Ct. at 2817. Pointing out that many facts in the record are disputed, Moore argues that the inspectors cannot establish a "purely legal" issue subject to interlocutory appeal, *id.* at 530, 105 S. Ct. at 2817, unless they concede the plaintiff's view

of the facts—something Moore says the inspectors refuse to do. Accordingly, Moore argues, we lack jurisdiction to entertain the inspectors' appeal.

We have little trouble rejecting Moore's argument. Although in one interlocutory case where we found jurisdiction, we did describe the facts as "effectively conceded," *see Farmer v. Moritsugu*, 163 F.3d 610, 614 *(D.C. Cir. 1998)*, we never suggested that such a concession was required for jurisdictional purposes. In fact, such a requirement would conflict with *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), which held that denial of a claim of qualified immunity remains an appealable collateral order even if the underlying facts are disputed—indeed, even if, as in this case, the district court denied the motion for summary judgment due to the presence of material issues of fact. *See id.* at 312-13, 116 S. Ct. at 841-42. While noting in reliance on *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens* explained that the solution to a disputed record on qualified immunity is the same as in any other summary judgment case: the court determines "what facts the district court, in the light most favorable to the nonmoving party, likely assumed," performing "a cumbersome review of the record" if necessary. *Behrens*, 516 U.S. at 313, 116 S. Ct. at 842 (quoting *Johnson*, 515 U.S. at 319, 115 S. Ct. at 2159). Once the facts are established under that standard, an immunity claim like the inspectors' raises "the purely legal question of whether or not an official's actions violate clearly established law," no less than in an appeal based

on agreed facts. *See Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-49 (D.C. Cir. 1999). Such legal questions—which sharply divide the parties in this case—fall squarely within the collateral order doctrine as expounded in *Mitchell v. Forsyth*.

Though neither party raises the issue, we also note that our statement in *Moore I* that "Moore's retaliatory prosecution claim . . . does allege the violation of clearly established law," 65 F.3d at 196, neither deprives us of jurisdiction nor controls our resolution of the issues before us. The denial of qualified immunity at summary judgment is a "final decision" subject to immediate appeal even if the defendant previously appealed a denial of the same claim on a motion to dismiss. *See Behrens*, 516 U.S. at 309-11, 116 S. Ct. at 840-41. Thus, although the inspectors conceded in the appeal from their motion to dismiss that Moore's claim stated a violation of clearly established law, they are free to assert qualified immunity now: the "legally relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss," because the court now conducts the immunity inquiry based on "the evidence before it," rather than the pleadings. *Id.* at 309, 116 S. Ct. at 840. Furthermore, as we explained in *Moore II*, our opinion in *Moore I* "said nothing about the elements of [a retaliatory prosecution claim], or whether Moore could succeed on his complaint." *Moore II*, 213 F.3d at 709. Accordingly, whether Moore's cause of action requires lack of probable cause remains a live issue.

III.

As the Supreme Court has recognized, although damages suits like Moore's "may offer the only realistic avenue for vindication of constitutional guarantees," such suits also carry substantial social costs, including the expense of litigation, the diversion of official energy, and the risk of deterring legitimate official action. *See Harlow*, 457 U.S. at 814, 102 S. Ct. at 2736. Striking "a balance between the evils inevitable in any available alternative," *id.* at 813, 102 S. Ct. at 2736, qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.* at 818, 102 S. Ct. at 2738. Underlying this doctrine is the basic principle of fair notice: officials may be held liable if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987); otherwise, the unfairness of holding officials responsible on grounds they could not have anticipated trumps the individual's interest in vindicating transgressed rights. *See id.* at 641, 107 S. Ct. at 3039; *Crawford-El v. Britton*, 523 U.S. 574, 590-91, 118 S. Ct. 1584, 1592-93, 140 L. Ed. 2d 759 (1998). To ensure that shielding public officials from unclear law does not freeze the law in place, however, courts facing qualified immunity claims ordinarily engage in a two-step inquiry, considering first what the law is, and only then whether that law was clearly established. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 1696, 143 L. Ed. 2d 818 (1999). Were the procedure otherwise,

constitutional avoidance might lead courts to rest on findings of uncertainty without first clarifying the law for future cases—a result contrary to the interest of both government officials and individuals claiming that such officials violated their constitutional rights. *See id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714 n.5, 140 L. Ed. 2d 1043 (1998).

Because the qualified immunity inquiry focuses on whether the officials could have known "what [they were] doing" was unlawful, *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039, defining the right "at the appropriate level of specificity" is critical. *Wilson*, 526 U.S. at 615, 119 S. Ct. at 1700; *see also Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001). While the right need not have arisen in identical or even "fundamentally" or "materially similar" circumstances, *see Hope v. Pelzer*, 536 U.S. 730, 739, 741, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002), the right can be considered clearly established only if the unlawfulness was "apparent" in light of pre-existing law, *see Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. The "salient question," then, is "whether the state of the law [at the relevant time] gave [the officials] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516.

In this case, Moore seeks to vindicate his right to be free from prosecution undertaken in retaliation for First Amendment activity. The inspectors, though conceding that right generally exists, *see Crawford-El*, 523 U.S. at 592, 118 S. Ct. at 1593 (describing the "general rule" that "the First Amendment bars retaliation for protected speech" as one that "has long been clearly established"), urge us to define the claim more specifically. Insisting the record shows that they acted

with probable cause, the inspectors argue that what they were doing could violate a clearly established right only if the First Amendment prohibits retaliatory prosecution even when probable cause exists. Based on cases from other jurisdictions requiring lack of probable cause as an element of a retaliatory prosecution claim, the inspectors argue that no such right exists, much less a clearly established one. Moore disputes both points in the inspectors' syllogism: this circuit, he insists, clearly permitted liability despite probable cause at the time of his indictment, and in any event the inspectors acted without sufficient grounds for suspicion.

As instructed by *Wilson*, we consider this debate in two stages, asking first what the law is, and second whether that law was clearly established at the time of Moore's indictment. Because, as we shall explain, we agree with Moore that the inspectors may be liable even if they had probable cause, we have no need to determine whether, as the inspectors insist, they actually had probable cause to pursue Moore's indictment.

Were Moore's Rights Violated?

The question presented under the first element of the qualified immunity test—does the retaliatory prosecution cause of action require a lack of probable cause? —has already been answered by this circuit. In *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), we described the "essential elements of a retaliatory-prosecution claim" as follows:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was consti-

> tutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

Id. at 1257 n.93 (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (footnote omitted)). Nowhere does this statement suggest that lack of probable cause is an element of the claim, nor does its silence imply such a requirement. The standard *Haynesworth* articulated is this: once a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway. Given that probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability—there is no reason to expect that the mere existence of probable cause will suffice under *Haynesworth* to protect government officials from liability.

The inspectors insist that this circuit has never "squarely addressed" the issue they raise, leaving us free to require lack of probable cause. (Appellant's Br. at 25.) Again reading *Haynesworth*, we disagree. The relevant passage reads as follows:

> We share the conviction . . . that retaliatory prosecution unconstitutionally impinges on the right of access to the courts guaranteed by the First Amendment. Haynesworth alleged that he was charged with disorderly conduct solely because he refused to release his civil claims against the arresting officers. That averment, we think, partakes from the circumstances enough substance to entitle him to proceed directly under the First Amendment for damages.

Haynesworth, 820 F.2d at 1257 (footnotes omitted). Because this conclusion—that plaintiff had stated a claim for retaliatory prosecution—required some vision of what the claim entailed, *Haynesworth*'s articulation of the elements was central to its holding. True enough, plaintiff described his prosecution as "unmerited," *id.* at 1255, and the opinion said the charges arose "*solely* because" of protected activity, *id.* at 1257 (emphasis added), implying, perhaps, that plaintiff was prosecuted without probable cause. As we noted above, however, *Haynesworth*'s description of the cause of action left little doubt that probable cause would not automatically immunize a retaliatory prosecution. Because that description of the tort was part of *Haynesworth*'s holding, we lack authority to disregard it.

Haynesworth, moreover, is not the only case in which we have suggested liability may arise regardless of probable cause. In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), *overruled on other grounds by Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), in which plaintiff alleged that police pressed charges to deter the vindication of civil rights, we noted "the at least arguable

existence of probable cause," yet went on to consider the sufficiency of the motive allegations. *Id.* at 1434. That disposition implied that a showing of probable cause, by itself, is insufficient to preclude liability. *Id.* at 1434. As the inspectors argue, *Martin* could be read to have simply assumed the validity of the claim so as to reach the motive issue, but the case at least reinforces the view that probable cause is not conclusive. Demonstrating the continuing vitality of *Haynesworth*, moreover, our two prior opinions in this case relied on that decision in discussing retaliatory prosecution. *See Moore I*, 65 F.3d at 196 & n. 12; *Moore II*, 213 F.3d at 709.

As the inspectors point out, several other circuits require lack of probable cause in retaliatory prosecution actions. *See, e.g., Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 796-97 (3d Cir. 2000); *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998). These cases, however, are not the law of this circuit—*Haynesworth* is. Besides, two other circuits agree with *Haynesworth*. *See Greene v. Barber*, 310 F.3d 889, 897-98 (6th Cir. 2002); *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001). Our approach, moreover, comports with the Supreme Court's framework in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). In that case, which involved an untenured public school teacher's claim that the school board fired him because of his First Amendment activity, the Court explained that if the teacher could show his constitutionally protected conduct to have been a "motivating

factor" in the firing, the burden would shift to the board to establish that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287, 97 S. Ct. at 576. While the criminal context, of course, involves considerations of prosecutorial discretion absent in a school employment decision, *Mt. Healthy* provides considerable support for *Haynesworth*.

Although *Haynesworth*'s binding effect is enough to end the first part of our qualified immunity inquiry, the inspectors have raised serious objections to our approach, so we think it useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability. To begin with, probable cause, requiring no more than "information sufficient to warrant a prudent man in believing the suspect has committed or is committing an offense," *United States v. Kayode*, 254 F.3d 204, 209 (D.C. Cir. 2001) (internal quotations and alterations omitted), is designed for the ordinary arrest or prosecution where courts may presume that government officials exercised their discretion in good faith, so long as their actions were not obviously unfounded. Yet when plaintiffs demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute—as in a prima facie case under *Haynesworth*—courts may no longer presume that appropriate considerations guided the government's decision-making. In such circumstances, were courts to demand no more than a showing of probable cause, as the inspectors urge, law enforcement officers could freely bring marginal cases against advocates of disfavored views, even if the officers' only reason for doing so were hostility to those views. The inspectors' approach, in other words, interprets the First Amend-

ment to prevent only baseless prosecutions, i.e., prosecutions lacking probable cause. As the inspectors see it, constitutional free speech protections say nothing about prosecutions brought only because the defendant is, say, a peace activist, a Klan member, a Democrat, or a Republican.

In our view, the First Amendment prohibits such targeted prosecutions, just as it prohibits legislation aimed at punishing free speech. To be sure, prosecutorial discretion is a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996), but as the Supreme Court has made clear, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985) (internal quotations and citations omitted). Respectful of executive discretion, *Haynesworth*'s framework allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds. When hostility to speech represents a but-for cause of the prosecution, however, the charges are "deliberately based upon an unjustifiable standard." *Id.*

We also disagree with the inspectors that analogous First Amendment *Bivens* claims call for imposing an "objective" threshold requirement relating to the defendant's culpability. Pointing out that "courts in other contexts have interposed rules requiring some objective showing before scrutinizing a criminal prosecution for bad faith or other ill motive," the inspectors

argue that lack of probable cause should be required in the retaliatory prosecution context because it affords "a ready-made (but not insurmountable) objective criterion as a first step in assessing prosecutorial discretion." (Appellant's Br. at 29-30.) Yet the two defenses the inspectors cite in support of their theory—selective prosecution and vindictive prosecution—are hardly irreconcilable with *Haynesworth*. It is true that a selective prosecution claim requires proof not only that prosecutors acted with bad intent, but also that "similarly situated individuals [outside the protected category] were not prosecuted." *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1487. But once that showing has been made, the accused has a defense to the charges. *See United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982); *United States v. Steele*, 461 F.2d 1148, 1151-52 (9th Cir.1972). Thus, contrary to the inspectors' theory, selective prosecution doctrine supports our view that constraints on prosecutorial motive may at times override the interest in punishing objectively culpable conduct.

As for vindictive prosecution, that defense entails a framework much like the one *Haynesworth* adopted for retaliatory prosecution: if evidence indicates a "reasonable likelihood" that the government acted "to punish a defendant for exercising his legal rights," a presumption of vindictiveness arises, which the government may rebut with "objective information in the record justifying the increased sentence or charges." *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002) (quoting *Maddox v. Elzie*, 238 F.3d 437, 446 (D.C. Cir. 2001)). Though the government's burden under this standard may be lighter than under *Haynesworth*, in both cases prima facie evidence of bad motive triggers

an obligation on the government's part to show that permissible considerations supported its action. The standard the inspectors propose, in contrast, requires plaintiffs—the alleged victims—to establish lack of justification in the first instance.

Our reluctance to impose objective limitations finds support in the logic of *Crawford-El*. In that case, the Supreme Court held that while qualified immunity protects officers who comply with an objectively reasonable view of the law, it affords no protection against claims under clearly established law that entail the subjective element of improper intent. *See Crawford-El*, 523 U.S. at 593-94, 118 S. Ct. at 1594-95. Consistent with this reasoning, we see no reason why compliance with the objective probable cause standard should bar scrutiny of subjective motivations here. Other constraints identified in *Crawford-El*—procedural mechanisms for limiting discovery and facilitating summary judgment, as well as the opportunity to show the prosecution would have happened anyway, *id.* at 592-93, 597-601, 118 S. Ct. at 1593-94, 1596-98—may screen out baseless motive claims without precluding recovery in cases where officers pursue retaliatory charges they would not have undertaken but for their unconstitutional animus.

In sum, the law of this circuit, as expressed in *Haynesworth*, affords damages liability for prosecutions that would not have occurred without retaliatory motive, even if the officers involved acted on the basis of probable cause. This theory of liability, we hasten to stress, is limited. Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. A *Bivens*

recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus. In such circumstances, government officers cannot prevail under *Haynesworth* because they cannot establish that legitimate considerations supported their action.

Moore's case appears to be an example of this rare circumstance, at least when we view the evidence in the light most favorable to Moore, as we must at summary judgment, *see, e.g., Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1278 (D.C.Cir.1995). Looking at the record through that lens, we detect not only strong evidence of retaliatory motive, but also quite weak indicators of probable cause.

Beginning with motive, we think the record permits, at the least, a reasonable inference that the inspectors had Moore's lobbying campaign in mind as they pursued his indictment. The inspectors referred explicitly to Moore's political activities in two reports summarizing the evidence in the REI investigation. The first, titled "Arguments for Indicting the Corporation," lists the following as the first of nine "bas[es]" for indicting REI:

> Independent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example:
>
> a. staged questions and testimony before Congress
>
> b. Frost amendment to freeze USPS appropriations bill.

Similarly, a "Details of Offense" memorandum submitted to the U.S. Attorney's Office refers to REI's lobbying activities as evidence that Moore and Reedy (the REI vice president) had "intent to defraud the USPS":

> Moore's, Reedy's and REI's intent to defraud the USPS is evident in the following events and transactions that related to Voss' official influence but were independently initiated by Moore and Reedy.
>
> - On or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate [*sic*] bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI.
>
> . . . .
>
> - During the period August 1985 to April 1986, REI continued to undermine the competitive testing program [an aspect of OCR procurement] via the media and Congress.

Read in Moore's favor, these documents suggest that the inspectors regarded Moore's speech and lobbying—activities clearly subject to First Amendment protection—as grounds for prosecution, even though these activities were "independent of Voss/GAI actions" (presumably a reference to the alleged conspiracy). Consistent with this view of the inspectors' motives, subpoenas in the REI investigation targeted speech and lobbying activity, seeking, among other things, "articles placed with trade publications and reporters," "interviews with journalists and reporters," "meetings

with United States Congressmen," and "consulting services or meetings with or regarding the REI Political Action Committee."

Reinforcing the inference that the prosecution would not have happened without retaliatory motive, the evidence supporting the government's case—again, viewed in the light most favorable to Moore—appears quite weak. To begin with, the strongest evidence connecting REI to the conspiracy related to Moore only indirectly. Though Voss, the corrupt USPS governor, called Moore at one point to ask "why hadn't it [a contract with GAI] been done," Voss gave his initial referral not to Moore, but to Reedy. Reedy may have known the GAI contract was fishy; at the least, information from Gnau about conversations he had with Reedy gave the inspectors reason to suspect as much. *See REI*, 725 F. Supp. at 593-94. In addition, Reedy, perhaps revealing a guilty conscience, initially lied to the inspectors about the source of the GAI referral. *Id.* at 595-96. Yet no record evidence indicates that Reedy shared with Moore whatever misgivings he may have had about the contract.

Attempting to connect Moore to the conspiracy, the inspectors point to several scribbles about Voss and GAI in a notebook Moore labeled "Postal." One entry, apparently dating from December 18, 1984, reads as follows:

> Get John Knau [*sic*] involved—have broad scale assoc w/ John—get together
>
> ---
>
> * Call Peter Voss
>
> ---
>
> "The business to be had here is substantial"

Another entry dated April 29, 1985 again mentions Gnau and Voss, while also referring to Zip + 4; to John McKean, the Chairman of the USPS Board of Governors; to Electrocom Automation, Inc., a competing producer of scanning technology; and to James Jellison, a top USPS official:

USPS—prudent to do contingency planning

- ZIP + 4 not going well
- Consultant—wired (Peter Voss)
- Inside vs outside control
- 100 systems—$150m-$250m
- McKean—West Point/airborne/Gonzaga HS
- Upgrade at Electrocom
- Jellison

Elsewhere, the notes appear to refer to information from a "closed session" of the USPS Board of Governors, and an entry dating from January 27, 1987—more than six months after Voss's guilty plea—suggests that Moore gave advice to employees in preparation for Postal Inspection Service interviews:

Critical Incident • Final "fishing trip"

• Lawyer in DC—late for hearing—Martin Luther King—no copy of transcript

(plea arrangement) —date of plea

—conversation between judge +

U.S. Attorney

- lot of homework
- drive a wedge between people (intimidate)
- answer "I don't know, I really can't remember"

- excitable
- all kinds of scenarios
- ask same questions over and over
- don't show him how smart you are
- don't relax
- long interrogation (tough questions at end)
- possible subpoena

Note [illegible] B/S list based (1/27) on high number of charges

The inspectors interpret these notes to show that Moore (1) formed a "broad scale" criminal association with Gnau and Voss, (2) sought "inside control" of the Board of Governors through a "wired" consultant (i.e., Gnau), and (3) obstructed the Postal Inspection Service investigation.

Reading the notes in Moore's favor, however, we think it at least as plausible that the notes reflect perfectly innocent business considerations, such as Moore's interest in forming a legitimate relationship with a well-connected lobbyist and protecting his employees from potentially damaging litigation. To be sure, as the inspectors point out, Moore's interview advice includes no instruction to tell the truth, while the instruction to answer "I don't know, I really can't remember" could suggest a coverup. But Moore points to evidence suggesting he did encourage his employees to tell the truth, and in light of that evidence, Moore's "I don't know" statement could mean nothing more than that he cautioned employees to avoid guesswork and speculation—guidance that, like Moore's other notes, reflects standard deposition advice.

Next, the inspectors think it suspicious that Moore's notebook was missing thirty-six of its eighty pages, and

that REI failed to locate certain subpoenaed phone records from late 1984 and early 1985—the "critical period," as the inspectors see it, for the formation of the conspiracy. Because Marcus told the inspectors he had heard from Spartin that "Reedy, Moore, Gnau and Voss . . . met and developed a story to cover up their involvement," the inspectors suspected that REI officials removed the pages and records to cover their tracks. Yet phone records were also missing from early 1984—long before the Voss referral—while REI produced other evidence (including at least one phone message) revealing contacts between Moore and Voss. As for the notebook, Moore explained during his deposition that he often tore out sheets for his secretary to type. Given the posture of this case, we must resolve these ambiguities in Moore's favor, leading us to conclude that the missing notes and records fail to establish a coverup.

Other evidence points to Moore's innocence. Though lacking any evident reason to protect Moore, not one of the conspiracy's admitted members fingered him. Spartin, for example, failed to corroborate Marcus's assertion that Moore and Reedy agreed to a coverup. In fact, despite extraordinary pressure—at one point as many as ten inspectors surrounded Spartin while an Assistant United States Attorney tore up his immunity agreement—Spartin never indicated that Moore knew of the conspiracy. Instead, Spartin stated that although he "[didn't] give a hoot and hell about Bill Moore," he would not "make up a story" to incriminate Moore. Asked whether "anyone in REI knew Peter Voss was involved in this scheme . . . or was being paid," Spartin offered only that other witness statements the inspectors had shown him suggested Moore's guilt:

"Let me answer you this way," Spartin said. "Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Voss even told the inspectors there was "no way Moore knew" of anything improper.

Recognizing the deficiencies in the inspectors' evidence, the U.S. Attorney's Office hesitated to indict—even though the inspectors urged it to do so. "The facts underlying this [proposed] indictment are complicated, and the evidence is entirely circumstantial," the Chief and Deputy Chief of Special Prosecutions wrote in a memo to the U.S. Attorney. "If this matter goes to trial it will be a very difficult case and consume significant resources." While concluding—incorrectly, as it turned out—that "there is enough evidence to get by an MJOA [motion for judgment of acquittal]," the memo described the chances of convicting Moore, Reedy, and REI as "questionable." As to Moore specifically, the two Assistant United States Attorneys observed:

> [N]one of the evidence shows direct knowledge by Moore of the payments to Voss through GAI. Even when the evidence is considered in light of Moore's close association with Reedy—from which one can infer that Moore knew of at least some of Reedy's conversations with Gnau—it proves no more than that Moore *probably* knew of the payments to Voss.

True enough, Joseph Valder, the AUSA handling the investigation, disagreed with the memo, stating in a response that "hundreds, if not thousands, of pieces of direct evidence . . . show that the defendants are

guilty beyond a reasonable doubt." Nevertheless, the opinion of the Chief and Deputy Chief of Special Prosecutions—two experienced prosecutors—that the evidence was "questionable" adds weight to Moore's assertion that unbiased officials would never have pressed charges against him.

The record also suggests that unusual prodding from the Postal Inspection Service contributed to the eventual decision to indict—an inference that could, again, support Moore's theory of retaliatory motive. The Chief Postal Inspector, C.R. Clauson, twice wrote to the U.S. Attorney, Jay Stephens, urging him to press charges against Moore, Reedy, and REI. In the second letter, which followed the AUSAs' memorandum, Clauson wrote, "Frankly, Jay, I am disappointed by your office's failure to act on this matter and the series of broken promises from your staff (review committee) relative to the date and nature of their recommendation." Both Clauson and another inspector (one of the defendants in this case) said in their depositions that they were unable to recall the Postal Inspection Service ever sending a similar letter.

Moreover, some record evidence could lead a reasonable trier of fact to conclude that when the U.S. Attorney's Office finally decided to indict, the inspectors behaved before the grand jury as if their case needed bolstering. For example, when Robert Bray, an REI Vice President, wanted to explain in his grand jury statement that to his knowledge Moore and Reedy knew nothing about the payoffs, Valder and the inspectors refused to let him say any such thing, despite protracted negotiations with Bray's lawyer. Valder apparently circled portions of Bray's draft statement and wrote "don't reveal." The record also suggests that

the inspectors and Valder showed the prepared grand jury statements to Spartin during his polygraph examination, and that they shared investigative materials—allegedly including grand jury evidence—with Bolger's ousted successor as PMG, Paul Carlin.

Considering all this evidence together and interpreting it in Moore's favor, we cannot conclude that the postal inspectors would have prosecuted Moore had they not been irked by his aggressive lobbying against Zip + 4. The evidence of retaliatory motive comes close to the proverbial smoking gun: in addition to subpoenas targeting expressive activity, Moore has produced not one, but two Postal Inspection Service documents specifically referring to his lobbying as a rationale for prosecution. At the same time, evidence of guilt seems quite weak: not only did none of the admitted conspirators implicate Moore, but even the U.S. Attorney's Office concluded that, at best, Moore "probably" knew about the charged conspiracies, and even that conclusion rested on the assumption that Reedy likely shared with Moore his misgivings about Gnau and Voss—an assumption the record fails to substantiate. Moreover, the U.S. Attorney's Office warned that the case would be "complicated" and "consume significant resources"—considerations that, under normal circumstances, might weigh against prosecuting a marginal case. Applying the *Haynesworth* test, we believe this combination of factors—complexity and expense plus strong indications of retaliation and weak evidence of probable cause—suggests not only that hostility to free expression was at least a motivating factor in Moore's prosecution, but also that the inspectors may be unable to rebut that inference. Accordingly, Moore has alleged the violation of a constitutional right, precluding sum-

mary judgment under the first element of the qualified immunity test.

Was the Law Clearly Established?

As to the qualified immunity test's second element, *Haynesworth* again stands as the key authority. Decided in 1987, a year before Moore's indictment, *Haynesworth* clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive. Our conclusion, then, that the inspectors' conduct was actionable under *Haynesworth* constrains us to hold that Moore has alleged the violation of a clearly established right.

The inspectors' argument to the contrary misapprehends the standard for clear law. True, *Haynesworth* stated the elements of retaliatory prosecution "without analysis in a footnote in an opinion generally addressing other issues." (Reply Br. at 12.) But as we noted earlier, *Haynesworth*'s description of the elements was part of its holding, and hence binding precedent, even if it appeared in a footnote. In any event, qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately. Here, *Haynesworth* established the elements of retaliatory prosecution, making plain that what the inspectors were doing—prosecuting a case they otherwise would have left alone—violated the First Amendment. *See Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039; *Butera*, 235 F.3d at 646. Neither *Haynesworth*'s purported lack of analysis nor its use of a footnote freed the Postal Service from the obligation to take note of the opinion and instruct its inspectors accordingly.

Nor did the decisions of other courts give the government reason to doubt that *Haynesworth* meant what it said. The law of other circuits may be relevant to qualified immunity, but only in the event that no cases of "controlling authority" exist in the jurisdiction where the challenged action occurred. *See Wilson*, 526 U.S. at 617, 119 S. Ct. at 1700. Here, a decision of this court—*Haynesworth*—provided guidance on exactly the issue the inspectors confronted. Moreover, even if cases from other jurisdictions could somehow infuse *Haynesworth* with ambiguity, they did not do so before 1988, for nearly all decisions on which the inspectors rely came later. At the time of Moore's indictment, only the Third Circuit required lack of probable cause, *see Losch v. Borough of Parkesburg*, 736 F.2d 903, 906-09 (3d Cir. 1984), although the Eleventh Circuit had hinted at such a requirement in *Motes v. Myers*, 810 F.2d 1055, 1060 (11th Cir. 1987); *see also Redd*, 140 F.3d at 1383. In contrast, and also at the time of Moore's indictment, the Fifth Circuit, though later embracing the Third Circuit's view, *see Keenan*, 290 F.3d at 260, had stated that an enforcement practice could be unconstitutional "if those who file such charges upon probable cause can be presumed to be motivated by a retributive purpose," *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984); *cf. Izen v. Catalina*, 382 F.3d 566, 571-72 (5th Cir. 2004) (holding that although "the government need not have even reasonable suspicion to undertake an investigation," an investigation undertaken "with the substantial motivation of retaliating" against protected speech may violate the First Amendment). Against this ambiguous background—at best, two circuits immunizing prosecutions based on probable cause and one apparently not—Postal Service officials could not rea-

sonably have read *Haynesworth* to require lack of probable cause.

To sum up, because *Haynesworth*'s framework for Moore's claim is incompatible with the probable cause-based standard the inspectors advocate, we conclude that the Postal Service had, as the Supreme Court put it in *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516, "fair warning" that government officers could be liable under the circumstances alleged here. Agreeing with the district court, we therefore reject the inspectors' claim of qualified immunity.

IV.

Some fifteen years after the district court dismissed the indictment and found evidence probative of Moore's innocence and thirteen years after Moore filed his first complaint, Moore's attorney quipped at oral argument: "I suppose I'd be the poster boy that a lawyer has to be crazy to take a *Bivens* case because you die before it ends." We trust this opinion will reassure *both* sides—Moore and the postal inspectors—that this case may now be resolved within the lifetime of their attorneys. With the inspectors' immunity theory dispatched, nothing stands in the way of a judgment on the merits; indeed, because the district court found material issues of fact in the record, the next step, presumably, will be preparation for trial. We affirm the decision of the district court and remand the case for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (RMU)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

MICHAEL HARTMAN ET AL., DEFENDANTS

Aug. 30, 2004

MEMORANDUM OPINION

URBINA, District Judge.

DENYING THE DEFENDANT'S MOTION FOR A RULING; DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

This matter comes before the court on the defendant United States' motion for a ruling on its motion to strike and for reconsideration of Judge Norma Holloway Johnson's August 5, 2003 order denying summary judgment to the United States.[1] The defendant argues that Judge Johnson "inadvertently" failed to rule on the defendant's motion to strike the plaintiff's statement of disputed material facts prior to denying the defendant's motion for summary judgment. The plaintiff responds

[1] The Calendar Committee for the United States District Court for the District of Columbia reassigned the case to this court in November 2003.

that Judge Johnson impliedly denied the motion to strike by denying the defendant's motion for summary judgment. Furthermore, the plaintiff argues that the defendant's request for reconsideration of Judge Johnson's order is a transparent attempt to reargue points in this court that the defendant already lost in front of Judge Johnson. For the reasons that follow, the court denies the motion for a ruling and denies the motion for reconsideration.

II. BACKGROUND

The facts of the underlying case are set forth in numerous prior opinions and the court will not recount them in great detail here. *E.g., Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000); *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). In 1989, after a district court found insufficient evidence to support a reasonable inference that Mr. Moore ("the plaintiff") was aware of a scheme to defraud and steal from the United States Postal Service, the plaintiff brought separate *Bivens*[2] and Federal Tort Claims Act ("FTCA") claims in the Northern District of Texas against, *inter alia*, the Assistant United States Attorney ("AUSA") who had just prosecuted him and the Postal Inspectors who had assisted in the case. *Valder*, 65 F.3d at 191. The federal court in Texas dismissed the *Bivens* claims against the AUSA and transferred both cases to this district, where Judge Johnson consolidated the cases for all future purposes. *Id.* at 192.

Years of litigation have whittled down the plaintiff's original cases to (1) a *Bivens* claim against the Postal Inspectors now on interlocutory appeal on the issue of

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[2] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

qualified immunity, and (2) a claim against the Postal Inspectors under the FTCA for malicious prosecution. *See* Joint Status Report (Mar. 8, 2004) at 2. The court today addresses the latter claim, on which Judge Johnson found a sufficient dispute of material facts to deny the defendant's motion for summary judgment.[3] *Id.* at 6. Normally the court would be proceeding to trial in this case, but the defendant has asked for a ruling on its motion to strike the statement of disputed material facts that the plaintiff filed prior to Judge Johnson's decision.[4] As the defendant argues, Judge Johnson's "by all indications inadvertent" oversight in ruling on the motion for summary judgment without addressing the motion to strike was "highly prejudicial to the United States in this litigation." Def.'s Mot. for Ruling on Mot. to Strike and for Reconsid. ("Def.'s Mot.") at 10. Of course, what the defendant is really concerned about is not whether plaintiff complied with the local rules. "If the [c]ourt considers and grants the

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[3] Judge Johnson held that, "[u]pon consideration of the motion of the defendants, United States, and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are material facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony to a key prosecution witness." Order (Aug. 5, 2003).

[4] The plaintiff submitted this statement of material facts pursuant to Local Rule 7.1(h), now Rule 7(h). "Rule 7.1(h) requires a party moving for summary judgment to provide a statement identifying the undisputed facts that entitle it to judgment as a matter of law, and directs the nonmoving party to respond with a statement listing the facts 'as to which it is contended there exists a genuine issue necessary to be litigated.'" *Waterhouse v. District of Columbia*, 298 F.3d 989, 991 n.2 (D.C. Cir. 2002) (quoting LCvR 7.1(h)).

United States' motion to strike, justice requires that the Order denying summary judgment be reconsidered." *Id.* The defendant, in short, would like the court to reconsider the government's motion for summary judgment.

III. ANALYSIS

A. The Court Denies the Defendant's Motion for a Ruling

The defendant's request for a ruling on the motion to strike cannot be addressed without determining whether Judge Johnson's order impliedly resolved that motion. The defendant argues in its motion to strike that the plaintiff's "lengthy [Rule 7.1(h)] statements are so laced with irrelevancies, rhetoric and legal conclusion that it is impossible to discern from them what [the plaintiff] thinks are the material facts genuinely in dispute." Def.'s Mot. to Strike at 6. The plaintiff objects to this characterization, stating that he "methodically responded to each of the more than 135 paragraphs set forth in the statements accompanying [the defendant's] motions for summary judgment with specific factual contentions supported by record citations." Pl.'s Opp'n to Mot. to Strike at 2.

Both parties now dispute whether the plaintiff's statement of disputed facts violated Local Rule 7(h). Much of the defendant's argument ignores the purpose of Rule 7(h), however, which is to "assist[ ] the district court to maintain docket control and to decide motions for summary judgment efficiently and effectively." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996). As the court in *Jackson* indicated, Rule 7(h) exists to help the judge; it "places the burden on the parties and their

counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Id.* at 151. Once a court rules on a motion for summary judgment, however, Rule 7(h) has largely served its purpose. Moreover, if the parties disagree over a Rule 7(h) submission, the court will presumably have before it the briefing on that disagreement, as did Judge Johnson for more than a year before she ruled on the summary judgment motion.

Because the summary judgment stage of this case is now over, the court is reluctant to revisit a motion regarding a rule designed to facilitate the adjudication of summary judgment. If the defendant had brought to this court's attention a misrepresentation in the plaintiff's Rule 7(h) statement on which Judge Johnson expressly relied, the court would have cause to address the matter. But the defendant brings nothing to this court's attention that it did not bring to Judge Johnson's attention in its motion to strike, except for speculation that Judge Johnson, "having been pressed by Moore to swiftly rule on summary judgment, inadvertently did not consider the pending motion to strike." Reply at 2.

The court therefore declines the defendant's invitation to speculate how Judge Johnson arrived at her holding. *Cf.* Def.'s Mem. at 8-10. The court believes that Judge Johnson was fully briefed on the defendant's arguments concerning the plaintiff's Rule 7(h) submission. The defendant has offered no reason for the court to think otherwise. Accordingly, the court will adhere to the presumption that a ruling inconsistent with an outstanding motion impliedly resolves that

motion.[5] The defendant's motion for a ruling is therefore denied, and the court proceeds to determine whether reconsideration is warranted.

B. The Court Denies the Defendant's Motion for Reconsideration

Judge Johnson's order is interlocutory because it denied a motion for summary judgment and did not dispose of the entire case on the merits. *Johnson v. Jones*, 515 U.S. 304, 307-09, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). At the outset, the court thus notes that

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[5] *See, e.g., King v. Tecumseh Public Schools*, 229 F.3d 1152, 2000 WL 1256899, *3 (6th Cir. 2000) (Table) (holding that entry of summary judgment while a motion for additional discovery was pending "should be construed as an implicit denial" of the motion for additional discovery); *Moody v. Town of Weymouth*, 805 F.2d 30, 31 (1st Cir. 1986) (holding that the court implicitly denied the plaintiff's motion to strike certain submissions because the court "in its opinion granting defendants' motion to dismiss, relied on defendants' materials"); *Addington v. Farmer's Elevator Mutual Ins. Co.*, 650 F.2d 663, 666 (5th Cir. 1981) (finding that the grant of summary judgment for the defendant "was so inconsistent with the plaintiff's request for leave to amend to state a new claim for relief as implicitly to deny the motion to amend"); *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir. 1966) (holding that "[w]hile it is certainly the better practice to specifically rule on all pending motions, the determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with granting the relief sought"). The defendant attempts to distinguish cases such as these by arguing Judge Johnson's order did not rely on any of the materials in the motion to strike. Reply at 4. As indicated above, however, Local Rule 7(h) facilitates the summary judgment determination. Once that determination is made, an outstanding motion concerning Rule 7(h) becomes less critical absent some extraordinary circumstance not present here. Thus, the court holds that Judge Johnson's order is indeed inconsistent with the motion to strike and that the order therefore impliedly resolved the motion to strike.

Rule 54(b), not Rule 60(b)(6), provides the relevant standard for reconsidering Judge Johnson's order. *See* Fed. R. Civ. P. 54(b) (stating that an interlocutory order on the claims or rights and liabilities of a party "is subject to revision at any time before entry of [final] judgment"). The distinction is important because, although courts only reconsider under Rule 60(b)(6) in "exceptional circumstances," courts have more flexibility in applying Rule 54(b). *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1470 (4th Cir. 1991) (rejecting "vigorously" the lower court's application of the Rule 60 standard to an interlocutory, Rule 54(b) determination).

Furthermore, because Judge Johnson's order is interlocutory, the law of the case doctrine does not automatically apply. *Langevine v. District of Columbia*, 106 F.3d 1018, 1022-23 (D.C. Cir. 1997). That doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). "[T]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Id.*

The inapplicability of the law of the case doctrine theoretically leaves the court with greater discretion to revisit Judge Johnson's order, but this is not to say that district courts should take lightly reconsideration of the orders of their colleagues. As the D.C. Circuit has stated, "[i]nconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that we must act alike in all case of like

nature." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (noting that the law of the case doctrine helps implement this principle). Thus, although Judge Johnson's order is not "subject to" the law of the case doctrine, *Langevine*, 106 F.3d at 1020,[6] nothing prevents the court from applying the rationales of that doctrine to guide a Rule 54(b) decision. *Virgin Atlantic Airways v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992) (holding that "[e]ven if Rule 54(b) allows parties to request district courts to revisit earlier rulings, the moving party must do so within the strictures of the law of the case doctrine"); *cf. Langevine*, 106 F.3d at 1023-24 (quoting the proposition in Moore's that, in a case where the first judge likely committed clear error, the transfer between judges "should no more freeze prior rulings than it should require their routine reexamination").

Indeed, courts apply a wide variety of tests to determine reconsideration under Rule 54(b).[7] As the Second

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[6] Although failure to adhere to the law of the case doctrine may in some cases constitute abuse of discretion, adherence to the doctrine is not mandatory. *See Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L.Ed. 1152 (1912) (Holmes, J.) (noting that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power").

[7] *See, e.g., United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) (interlocutory orders may be reconsidered by a district court when doing so is "consonant with justice"); *M.K. v. Tenet*, 196 F. Supp. 2d 8, 12 (D.D.C. 2001) (holding that "[r]econsideration of an interlocutory decision . . . is available under the standard, 'as justice requires'"); *A & H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.*, 2001 WL 881718 (E.D. Pa. 2001) (indicating that "[c]ourts tend to grant motions for reconsideration [under Rule 54(b)] sparingly and only upon the grounds traditionally available under Fed. R. Civ. P. 59(e)"); *Gallant v. Telebrands Corp.*, 35

Circuit has noted, "one of the bases for the [law of the case doctrine], the desire to save judicial time, is not too persuasive when, as here, an overruling of our previous decision might well bring 'the case' to a much quicker end than it will otherwise have[.]" *Zdanok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944, 953 (2d Cir. 1964). In this case, a hypothetical scenario in which the court reconsiders Judge Johnson's order and holds in favor of the defendant would obviously further judicial economy because the case would be over. However,

> another consideration is applicable: where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. Perhaps the "good sense" of [the court's discretion of] . . . comes down to a calculus of the relative unseemliness of a court's

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F. Supp. 2d 378, 394 (D.N.J. 1998) (resolving a Rule 54 motion by determining whether the parties proffer supplemental evidence or new legal theories); *Neal v. Honeywell*, 1996 WL 627616, *2 (N.D. Ill. Oct. 25, 1996) (noting that such motions are "best characterized as a common law motion for reconsideration" and applying a the test of whether the court "has patently misunderstood a party," "has made a decision outside the adversarial issues presented to the Court by the parties," "has made an error not of reasoning but of apprehension," or "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court") (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (dealing with a post-judgment motion to reconsider)); *see generally Motorola, Inc. v. J.B. Rodgers Mechanical Contractors, Inc.*, 215 F.R.D. 581 (D. Ariz. 2003) (surveying various standards). The court additionally notes that is has required litigants to bring motions under Rule 54 "within a reasonable period after an interlocutory order during the pendency of the litigation." *Tax Analysts v. I.R.S.*, 152 F. Supp. 2d 1, 5 n.4 (D.D.C. 2001).

> altering a legal ruling as to the same litigants, with the danger that this may reflect only a change in the membership of the tribunal[.]

Id.

As indicated above, the defendant makes no argument now that it did not make to Judge Johnson. Judge Johnson had ample time to weigh the arguments, oppositions and replies on the motion for summary judgment, the Rule 7.1 submissions and the motion to strike. The only reason to which the plaintiffs can point to further delay this case is that Judge Johnson felt pressured by the plaintiff to rule on a motion and therefore forgot to rule on a motion to strike. Reply at 2. The court finds this argument speculative at best. In light of the "relative unseemliness of a court's altering a legal ruling as to the same litigants," *Zdanok*, 327 F.2d at 953, the court needs greater justification to revisit Judge Johnson's ruling than conjecture about whether she forgot something or felt rushed. Because the defendant fails to offer such justification, its motion for reconsideration is denied.

IV. CONCLUSION

For the foregoing reasons, the court denies the defendant's motion for a ruling and for reconsideration. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 30th day of August, 2004.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-cv-2288 (NHJ) (AK)
[consolidated with No. 93-cv-0324 (NHJ) (AK)]

WILLIAM G. MOORE, ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Aug. 5, 2003

ORDER

Upon consideration of the motion of defendants, United States and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are materials facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony to a key prosecution witness.

Accordingly, it is this 5th day of August, 2003,

ORDERED that Defendant's motion for summary judgment be and hereby is denied.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 99-5197 & 99-5198

WILLIAM G. MOORE, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

WILLIAM G. MOORE, JR., APPELLANT

v.

JOSEPH B. VALDER, APPELLEE

Argued: March 13, 2000
Decided: June 2, 2000

Before: SILBERMAN, RANDOLPH, and ROGERS, Circuit Judges

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Our first opinion in this case affirmed in part and reversed in part the district court's dismissal of William G. Moore, Jr.'s complaint against a prosecutor and postal inspectors and his complaint against the United States. *See Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). On remand, the district court again dismissed the claims against the prosecutor, Joseph B. Valder,

and granted judgment on the pleadings in favor of the government, rulings from which Moore now appeals.

I.

Moore's basic grievance is that he was unjustly prosecuted on charges concerning his dealings with the United States Postal Service. In the early 1980s, the company Moore headed—REI—wanted to sell the Postal Service multiple-line scanners, but the Service declined. Moore publicly criticized the decision. A Postal Service governor—Peter Voss—suggested to REI that it hire the consulting firm GAI to promote its product. REI did so. Voss had a side deal with GAI: thirty percent of the fees REI paid to the consulting firm were kicked back to Voss. After their crimes were discovered, Voss and several GAI officials plead guilty. William A. Spartin, GAI's president, negotiated an immunity deal in return for his cooperation.

Postal inspectors and prosecutor Valder, seeking to establish that Moore and REI knew of the kickback scheme, were told instead by each of five of the admitted conspirators, including Spartin, that no one at REI had such knowledge. The postal inspectors later drafted, and the prosecutor presented to the grand jury, "witness statements" for these individuals, but without this exculpatory information. Spartin's refusal to implicate Moore prompted Valder to tear up his immunity agreement and threaten to prosecute Spartin's son. Valder and the postal inspectors showed Spartin the government-drafted statements of the other witnesses. (Moore alleges this disclosure was a violation of grand jury secrecy rules.) Spartin continued to deny that he had personal knowledge of Moore's involvement, repeating the point nineteen

times during a polygraph test. Spartin then said "I have no knowledge of that at all. . . . But, you know, I read that goddam[n] testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Spartin then testified before the grand jury that in his "opinion" Moore knew of the kickback scheme.

Postal inspectors also provided witness interview statements and lab results to Paul Carlin, a former Postmaster General dismissed by the Board of Governors during the scanner controversy. Then, weeks before an indictment was returned against Moore, the inspectors passed along a draft indictment to Carlin. Carlin later filed a civil RICO claim against Moore, alleging that Moore conspired to have the Board dismiss him.

Moore, REI Vice President Robert Reedy, and REI were indicted by a federal grand jury in the District of Columbia in October 1988 for conspiracy to defraud the United States, theft, receipt of stolen property, mail fraud and wire fraud. Despite a court order to turn over even "borderline" *Brady* evidence, Valder failed to provide the defense with exculpatory material, including the Spartin lie detector results and the amended statement of one witness denying any knowledge that REI officials were aware of the kickbacks. The district court granted Moore's motion for judgment of acquittal at the close of the government's case, stating that "[m]uch of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context [and] some of the government's evidence is exculpatory and points toward innocent conduct. . . ." *United States v. Recognition Equip., Inc.*, 725 F. Supp. 587, 587-88 (D.D.C. 1989).

Moore then brought his suits against Valder and the postal inspectors under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and against the United States under the Federal Torts Claims Act (FTCA), *see* 28 U.S.C. §§ 2671-2680. After proceedings unnecessary to recount, the district court dismissed the complaints and Moore appealed. This court considered whether, as the district court determined, Valder enjoyed absolute immunity from civil liability for malicious prosecution and for retaliatory prosecution.[1] *See Moore*, 65 F.3d at 192-95. Relying on the Supreme Court's distinction between a prosecutor's role as an advocate and his conduct as an investigator, *see Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991), *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), the court decided that absolute immunity shielded some, but not all, of Valder's conduct. Absolute immunity protected Valder from liability for his "decision to prosecute Moore," "for allegedly concealing exculpatory evidence from the grand jury," "for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes," and for failing to disclose exculpatory material before trial. 65 F.3d at 194. But absolute immunity did not apply to Valder's "[i]ntimidating and coercing witnesses into changing their testimony" or "disclosing grand jury information to unauthorized third parties." *Id.* at 194-95.

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[1] Moore did not appeal the dismissal of his other *Bivens* claims. *See* 65 F.3d at 191 n.3.

With respect to Moore's claims under the Federal Tort Claims Act, the court took note of the FTCA's "discretionary function" exception, which protects the government from liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. . . ." 28 U.S.C. § 2680(a). The following alleged conduct fell within the exception: "Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a *Brady* request." 65 F.3d at 197. "Disclosing grand jury testimony to unauthorized third parties, however, is *not* a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Id.*

On remand, Valder moved for summary judgment on the retaliatory prosecution claim, contending that Moore could not make out an essential element—that he brought the prosecution at least in part to retaliate against Moore's First Amendment activity—because absolute immunity protected his decision to prosecute Moore. The district court agreed and granted Valder's motion. *See Moore v. Valder*, No.92CV-2288, memorandum opinion at 17-24 (D.D.C. Feb. 5, 1998) ("mem. op.").

As to the FTCA claims, the district court determined that only one aspect of Moore's complaint survived this court's application of the discretionary function exception—namely, the claim that "AUSA Valder and the Postal Inspectors violated Federal Rule of Criminal

Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Paul Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation. . . ." FTCA Complaint ¶ 26. Moore argued that these two grand jury disclosures were sufficient to make out his malicious prosecution and abuse-of-process claims. Under the FTCA, however, claims of malicious prosecution and abuse of process can only arise from the conduct of "investigative or law enforcement officers of the United States government." *See* 28 U.S.C. § 2680(h). "'[I]nvestigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Postal inspectors are so empowered, *see* 39 C.F.R. § 233.1, but the district court concluded that federal prosecutors are not, *see* mem. op. at 32 & n.21 (citing *Bernard v. United States*, 25 F.3d 98 (2d Cir. 1994); *Gray v. Bell*, 542 F. Supp. 927, 932 (D.D.C. 1982), *aff'd*, 712 F.2d 490 (D.C. Cir. 1983)). The district court then ruled that the unprotected conduct of the postal inspectors did not establish a malicious prosecution or abuse-of-process claim and granted judgment in favor of the United States under Federal Rule of Civil Procedure 12(c). *See* mem. op. at 32-43.

II.

Two of the elements of a claim of retaliatory prosecution are "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct."

Haynesworth v. Miller, 820 F.2d 1245, 1256 n.93 (D.C. Cir. 1987) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979)). Moore thinks the ground of the district court's dismissal of his claim—that absolute immunity protected Valder with respect to his decision to prosecute—contravened this court's initial decision, in violation of the mandate. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996) (en banc). The prior opinion did hold that some of Valder's conduct was not protected by absolute immunity and the court did remand the retaliatory prosecution claim. But that opinion said nothing about the elements of such a claim, or whether Moore could succeed on his complaint. Rather than dealing with those subjects, the opinion focused on the type of prosecutorial conduct for which there would be absolute immunity. One such type of conduct, of course, was "the decision to prosecute Moore." 65 F.3d at 192. In his brief for that appeal, Valder had argued that if he had immunity for his prosecutorial decision, then Moore's retaliatory prosecution claim could not go forward. But it is clear to us that the court did not pass judgment on the argument, explicitly or implicitly. It follows that the district court did not contravene the mandate of this court.

According to Moore the district court erred for another reason. As he sees it, his retaliatory prosecution claim is not predicated upon Valder's decision to prosecute him. Just as a police officer can be liable for malicious prosecution as a result of his investigatory conduct leading to the prosecution, so too, Moore contends, should a prosecutor be liable if his investigatory conduct leads to the prosecution. *See infra* Part IIIA. The problem for Moore is that we rejected this very argument in *Dellums v. Powell*, 660 F.2d 802, 805-07

(D.C. Cir. 1981) ("*Dellums II*"). A "prosecutorial official," we ruled, could not be "held liable for causing a prosecution to be brought," despite the fact that *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), extended only qualified immunity to prosecutors acting in an investigatory capacity.[2] 660 F.2d at 806. Moore believes the law has changed since *Dellums II*, but he cites no cases in which a prosecutor has been held liable for malicious or retaliatory prosecution. If a prosecutor cannot be sued for malicious or retaliatory prosecution, Moore asks, why would the Supreme Court continue to devote its time to discerning which prosecutorial actions are protected by absolute immunity and which are not? *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). The answer is that there are potential causes of actions against prosecutors that do not rely on the decision to prosecute. A violation of the Fourth Amendment is one of the more obvious examples.

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[2] It may seem odd that the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor. A similar point was made in *Imbler*, to which the Court responded with a quotation: "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428, 96 S. Ct. 984 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)).

We therefore will affirm the dismissal of Moore's *Bivens* claim against Valder.[3]

III.

With respect to Moore's FTCA action against the United States for malicious prosecution and abuse of process, "the law of the place where the act or omission occurred" is controlling. 28 U.S.C. § 1346(b). All agree that District of Columbia law must be consulted. *See Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994).

A. Malicious Prosecution

Under local law four elements make up the tort of malicious prosecution: (1) the defendant's initiation or procurement of a criminal proceeding against the plaintiff; (2) absence of probable cause for the proceeding; (3) malicious intent on the part of the defendant; and (4) termination of the proceeding in favor of the plaintiff. *See Davis v. Giles*, 769 F.2d 813, 814-15 (D.C. Cir. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 653 (1977)). As the first element indicates, in theory not only the prosecutor who initiates criminal proceedings, but also a person who "procures" a criminal proceeding may be liable for malicious prosecution. *See also* Restatement (Second) of Torts § 653. In fact, those who procure malicious prosecutions are usually the only potential defendants because, as here, prosecutors enjoy absolute immunity. *See* W. PAGE KEETON

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[3] Moore also contends that the district court improperly denied his request for discovery. But a district court may deny discovery requests when additional facts are not necessary to resolve the summary judgment motion. *See White v. Fraternal Order of Police*, 909 F.2d 512, 516-17 (D.C. Cir. 1990) (en banc).

ET AL., PROSSER AND KEETON ON TORTS § 119, at 873 (5th ed. 1984). To succeed in this case, Moore must rely on the procurement component of the first element, focusing on the conduct of the postal inspectors in disclosing grand jury material. The remainder of the postal inspectors' conduct fell within the FTCA's discretionary function exception, *see* 65 F.3d at 197, and none of Valder's conduct can be the basis for a malicious prosecution claim against the government because he is not an investigative or law enforcement officer, *see* 28 U.S.C. § 2680(h).

In order to find that a defendant procured a prosecution, the plaintiff must establish "a chain of causation" linking the defendant's actions with the initiation of criminal proceedings. *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) ("*Dellums I*"). Moore's chain consisted of the postal inspectors' releasing of grand jury testimony to Spartin, which caused Spartin to incriminate him, which led to his indictment and then his prosecution.[4] *See* mem. op. at 36; FTCA Complaint ¶ 26.

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[4] In his brief, Moore stated only that Valder disclosed grand jury material to Spartin, though he mentions that the inspectors were present at the time. *See* Brief for Appellant at 10. The government jumps on this to argue that Moore's claim had to be dismissed because a malicious prosecution claim under the FTCA can rely only on the conduct of investigative or law enforcement officers and Valder is not one. Moore's complaint, however, alleged that "AUSA Valder *and the Postal Inspectors* violated Federal Rule of Criminal Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses. . . ." FTCA Complaint ¶ 26 (italics added). We therefore assume that the postal inspectors did play a role in presenting grand jury materials to Spartin.

It may be helpful at this point to look more closely at *Dellums I* and the chain of causation there held sufficient to establish procurement of a prosecution. Plaintiffs had won a verdict against Powell, the D.C. Police Chief, for his role in bringing about criminal charges against anti-war demonstrators. *See* 566 F.2d at 173-75, 193. The court noted that the "chain of causation" would have been broken if the decision to prosecute was "independent of any pressure or influence exerted by Powell and of any knowing misstatements which Powell may have made" to the prosecutors. *Id.* at 192-93. But Powell had knowingly misled the prosecutors when he failed to disclose the fact that the demonstrators were "peaceful" and "not that disorderly." *Id.* at 193. This was sufficient evidence "from which the jury could have concluded that Chief Powell had procured the filing of informations. . . ."[5] *Id.*

We see two distinctions between Moore's case and *Dellums I*. The first is that the postal inspectors themselves did not make the misrepresentations, but allegedly caused Spartin to make them. The district court did not rely on this distinction and we think its effect is only to require Moore to prove an additional link: but for the postal inspectors' disclosure of grand jury testimony to Spartin, he would not have implicated Moore before the grand jury. *See* KEETON ET AL. § 119, at 873 (stating that significant "second-hand" involvement in instigating a prosecution is sufficient).

The second distinction is that the misleading information was presented to the grand jury. The district court made much of this: "Moore has alleged only that the

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[5] The court ordered a new trial, however, because of improper jury instructions. *See id.*

postal inspectors influenced the grand jury's decision to indict . . . Moore's allegations ignore the fact that malicious prosecution requires the initiation of a prosecution by the Executive Branch, not the grand jury. Even if this Court could determine that Spartin's testimony 'caused' the indictment, this would not satisfy the first element because a grand jury indictment cannot by itself initiate a prosecution." Mem. op. at 36-37 (footnotes omitted). We do not believe this accurately reflects District of Columbia law set forth in *Davis v. Giles*. A criminal proceeding is a prerequisite to the malicious prosecution tort. If the proceeding starts with a grand jury indictment and the defendant procured the indictment, the first element of the tort is satisfied. When "an indictment is found by a grand jury . . . the return of the indictment . . . marks the institution of the proceedings." RESTATEMENT (SECOND) OF TORTS § 654 cmt. c; *see* KEETON ET AL. § 119, at 871-72 ("The initial step is of course a matter of the procedure of the particular jurisdiction; and where prosecution is begun by an indictment, or an information filed by the prosecuting attorney, it seems clear that this should be enough, since it constitutes official action and sets the law in motion.").

The government argues that because later actions—the presentation of evidence to the grand jury, for instance—were protected, Moore's case collapses. The district court seemed to agree. *See* mem. op. at 37. If this were enough to break the chain of causation, if the "discretionary function" of presenting evidence to the grand jury or prosecuting the plaintiff shielded prior misconduct from liability, a plaintiff would never be able to make out a malicious prosecution claim against the government. Yet the FTCA specifically recognizes

the tort of malicious prosecution. *See* 28 U.S.C. § 2680(h). We think it follows that although a plaintiff may not rely on an official's alleged misconduct during the exercise of discretionary functions, this does not immunize earlier, unprotected misconduct from ordinary principles of tort liability. *Cf. Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); RESTATEMENT (SECOND) OF TORTS § 653 cmt. g.

For similar reasons we disagree with the district court that Valder's continuation of the prosecution after the indictment came down constituted an independent act that broke the causal chain. *See* mem. op. at 37. Without the indictment the prosecution could not have continued. *See* FED. R. CRIM. P. 7(a). As we have said, if a prosecutor's continuation of a prosecution automatically immunizes prior steps in the prosecution, then the whole notion of liability for maliciously "procuring" a prosecution would disappear. "[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones v. City of Chicago*, 856 F.2d at 994 (citing, among other cases, *Dellums I*, 566 F.2d at 192-94); *accord* RESTATEMENT (SECOND) OF TORTS § 653 cmt. g. On the other hand, if Moore would have been indicted and prosecuted anyway, even without the postal inspectors' alleged misconduct and Spartin's testimony, then the United States cannot be held liable. *See Jones*, 856 F.2d at 993. Since the case is still at the pleading stage, there is no telling how the evidence will turn out. All that concerns us now is that the complaint sufficiently set forth

the first element of the malicious prosecution tort. *See Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000).

B. Abuse of Process

Under District of Columbia law, abuse of process occurs when "process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. 1967) (citing 1 AM. JUR. 2D *Abuse of Process* § 4 (1962)). Local courts have emphasized that "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law. . . ." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980); *accord Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992); *see also Heck v. Humphrey*, 512 U.S. 477, 486 n. 5, 114 S. Ct. 2364, 129 L. Ed .2d 383 (1994); *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1997) ("The essence of the tort of abuse of process is the use of the legal system 'to accomplish some end which is without the regular purview of the process. . . .' "(quoting *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992))). The Restatement also focuses on this element of the tort: "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." RESTATEMENT (SECOND) OF TORTS § 682 cmt. b.

Moore's complaint failed to allege this critical element of the abuse-of-process tort and, for this reason, the district court properly rendered a judgment on the pleadings in favor of the government. The only paragraph in the complaint dealing with this tort alleged the

following: "AUSA Valder and the Postal Inspectors violated Federal Rule of Criminal Procedure 6(e)(2), which protects the secrecy of Grand Jury proceedings, by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service. The Postal Inspectors even gave Carlin a copy of a draft indictment for his review." FTCA Complaint ¶ 26. As Moore sees it, his allegations regarding Carlin are sufficient to make out a cause of action. But nothing in paragraph 26 of the complaint speaks of *using* the grand jury process for the purpose, immediate or otherwise, of obtaining evidence to assist Carlin in bringing a civil suit. The paragraph alleges only that the postal inspectors disclosed witness testimony and the draft indictment to Carlin.[6] Disclosing information is a far cry from *using* the grand jury to assist Carlin's civil litigation. If the complaint is true, the postal inspectors violated the secrecy of the grand jury. But that does not, in itself, constitute abuse of process. The "process" here is the grand jury and the tort is made out only if the grand jury is misused. Because Moore does not allege the "critical concern" of abuse-of-process law—

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[6] Given that the indictment became public, we do not see how letting Carlin look at the draft could have damaged Moore unless the draft contained information omitted from the final version. We shall assume that the draft contained such information and that it was grand jury material.

that the inspectors *used* the grand jury for an improper purpose—we affirm the judgment of the district court.[7]

Affirmed in part and reversed in part.

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[7] We recognize that on Rule 12(c) motions "[w]e 'view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.'" *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992) (quoting *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988)). Even if we were to stretch this principle beyond its ordinary confines and infer that the postal inspectors somehow used the grand jury process for the purpose of obtaining evidence that they passed along to Carlin, Moore still could not make out an abuse-of-process claim. For one thing, Moore cannot base his abuse-of-process claim on the presentation of evidence to the grand jury—that is a discretionary function immune from suit under the FTCA. *See Moore*, 65 F.3d at 197; *see also Doe v. Stephens*, 851 F.2d 1457, 1462-63 (D.C. Cir. 1988) (causing a grand jury subpoena to issue falls within discretionary function exception). For another, prosecutors, not postal inspectors, convene and conduct grand jury proceedings—and the actions of a prosecutor cannot give rise to an abuse-of-process claim under the FTCA. *See* mem. op. at 32 & n.21 (citing 28 U.S.C. § 2680(h)).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civil No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEH B. VALDER, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civil No. 92CV2288 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Feb. 5, 1998

MEMORANDUM OPINION

This case arises from the federal prosecution of William G. Moore Jr. ("Moore") on charges of fraud, bribery, and conspiracy, of which Moore was acquitted, see *United States v. Recognition Equipment Inc.*, 725 F. Supp. 587 (D.D.C. 1989), and Moore's *Bivens*[1] and

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Federal Tort Claims Act ("FTCA")[2] claims for retaliatory prosecution, malicious prosecution, and abuse of process against Assistant United States Attorney Joseph Valder ("Valder"), six United States Postal Service Inspectors ("postal inspectors"), and the United States. Presently before the Court are the following motions: 1) defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 2) defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 3) defendant Valder's Motion for Summary Judgment; 4) plaintiff's Motion to Clarify the Stay Order of September 16, 1996, asking whether it applies to Valder; 5) defendant Postal Inspectors' Motion for Summary Judgment; and 6) defendant United States' Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss for Lack of Subject Matter Jurisdiction. The Court will address the motions in this order in light of the Court of Appeals' opinion in this case, *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995), cert. denied, 117 S. Ct. 75 (1996).

I. BACKGROUND

A. *The Facts*

As the United States Court of Appeals for the District of Columbia Circuit fully discussed Moore's claims in its opinion, *see Moore*, 65 F.3d at 191-92, the allegations in Moore's complaint and other submissions relevant to the pending motions are summarized as follows.

On October 6, 1988, plaintiff Moore was indicted for allegedly conspiring to bribe a member of the Board of

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[2] 28 U.S.C. §§ 2671 et seq.

Governors of the United States Postal Service ("USPS") in order to procure business for Recognition Equipment, Inc. ("REI"). Moore was Chairman, President, and Chief Executive Officer of REI at the time. Moore and Robert Reedy, another REI employee, were charged with participating in a kickback scheme in which a consulting firm, Gnau & Associates, Inc. ("GAI"), paid kickbacks to Peter E. Voss, a member of the Board of Governors of USPS, in exchange for his encouraging USPS business for GAI's clients, including REI. *See United States* v. *Recognition Equip., Inc.*, 725 F. Supp. 587, 589 (D.D.C. 1989). Five co-conspirators in the scheme, Peter Voss, John Gnau, Michael Marcus, Sharon Peterson, and William Spartin, pled guilty or testified pursuant to a grant of immunity. On November 20, 1989, Moore was acquitted of all charges. *See id.*

Two years later, on November 19, 1991, Moore commenced a *Bivens* cause of action for malicious prosecution (malicious prosecution claim) and one for prosecution in retaliation for the exercise of his First Amendment rights (retaliatory prosecution claim) against Valder and six postal inspectors. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The six postal inspectors are Frank Korman, Michael Hartman, Robert Edwards, Norman Robbins, Pierce McIntosh, and Daniel Harrington. Robbins and McIntosh have since retired, and Harrington has since died. Moore alleges that Valder and the postal inspectors conspired to prosecute him with malicious intent and/or in retaliation for public criticism of USPS.

The Court finds that Moore did engage in public criticism of USPS prior to his indictment and prosecu-

tion by Valder and that his conduct is constitutionally protected by the First Amendment.[3] In 1983, former Postmaster General ("PMG") William Bolger announced that USPS would use single-line scanners to identify addresses on mail instead of the multi-line scanners developed by REI. After this announcement, Moore voiced his criticism of USPS to Bolger, Assistant PMG James Jellison, the media, and members of the United States Congress. In 1985, Moore, Reedy, and REI lobbied to have Jellison and Bolger's successor as PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That same year, USPS began investigating REI for alleged irregularities in the procurement processes of USPS.

Moore claims that this investigation and his subsequent indictment and prosecution in 1988 and 1989 were brought in retaliation for his public criticism of USPS and its management. Valder and the postal inspectors allegedly coerced witnesses into incriminating Moore by using intimidation tactics and by disclosing secret grand jury information to them. Specifically, Moore claims that defendants coerced William Spartin, the president of GAI, into implicating Moore during his grand jury testimony. Spartin had been granted immunity from prosecution in exchange for his grand jury testimony. During a polygraph examination conducted by postal inspector Norman Robbins on December 5, 1986, Spartin stated nineteen times that he had no personal knowledge that Moore and REI knew of the kickback scheme. Moore claims that in

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[3] The Court makes this finding and other findings of fact in this opinion on the basis of its decision regarding the postal inspectors' and Valder's motions to strike Moore's amended affidavit and Local Rule 108(h) statement. *See supra* pp. 10-17.

order to coerce Spartin into implicating him, Valder and the postal inspectors tore up Spartin's immunity letter in front of him, threatened to prosecute his son, and showed him the grand jury statements of four co-conspirators.[4] These statements were allegedly drafted by Valder and the postal inspectors and indicated that REI and Moore had knowledge of the illegal payoffs.

At Moore's criminal trial, Valder admitted that he gave Spartin government-authored statements of the four other unindicted conspirators that had been adopted as part of the grand jury testimony. See Trial Tr. at 2553-54, 2561. He also admitted in his Answer to Moore's *Bivens* Complaint that a preplanned tearing up of Spartin's immunity letter did occur. *See* Valder's Answer at ¶ 21. On the basis of the evidence before it, the Court finds that Valder and the postal inspectors tore up Spartin's immunity letter, disclosed grand jury statements to him, and in some way threatened his son. The Court also finds that this conduct influenced Spartin's statement to the grand jury that in his "opinion," Moore had to have known about the illegal payoffs. The Court notes that none of Spartin's earlier statements indicating that Moore had no knowledge of the illegal scheme were ever presented to the grand jury.

Moore alleges that Valder and the postal inspectors also coerced Frank Bray, REI's Manager of Postal Programs, into changing his testimony to implicate Moore. Bray, like Spartin, had been granted immunity in exchange for his testimony to the grand jury. During interviews, Bray repeatedly told Valder and the postal

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[4] The statements came from Voss, Peterson, Marcus, and Gnau. *See* Trial Transcript 2550-54, 2727-31.

inspectors that Moore had no knowledge of the kickback scheme; nevertheless, they asked him to sign a witness statement indicating that Moore had knowledge. *See* Trial Tr. at 1809-11, 1832-33, 1939. When Bray refused to sign it, Valder told him he would have to testify before the grand jury for five to seven days or "however long it takes." *See id.* at 1824. Bray and his attorney then insisted that a paragraph be added to the witness statement to show that Moore had no knowledge of the scheme. *See id.* at 1833. Valder and the postal inspectors would not permit its inclusion, but agreed to afford Bray an opportunity to testify that Moore did not know of the scheme. *See id.* at 1939, 1943-44. When Bray testified before the grand jury, however, Valder did not allow him to do this. *See id.* at 1944.

Moore has also alleged that postal inspector McIntosh disclosed secret grand jury material to former PMG Paul Carlin in order to help Carlin bring a civil case against REI, Moore, and Reedy for Carlin's dismissal from USPS. Soon after Moore and Reedy were indicted, Carlin brought a $15 million RICA claim against them. Information that the government produced as Jencks material in Moore's criminal case reveals notes of a phone conversation between Carlin and postal inspector McIntosh on December 9, 1986 ("McIntosh Notes"). The McIntosh Notes indicate that Carlin requested and received grand jury information regarding interviews of former PMG Al Casey, Deputy PMG Jackie Strange, and John McKean, chairman of the USPS Board of Governors, and a lab examination. According to Carlin's testimony at Moore's criminal trial, postal inspectors Hartman and Kormann also

reviewed a draft indictment of Moore with Carlin on September 20, 1988. *See* Trial Tr. at 2153-56.

The Court finds on the basis of the McIntosh Notes and Carlin's trial testimony that postal inspectors McIntosh, Hartman, and Kormann disclosed secret grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e). Moore alleges that the purpose of these disclosures was to help Carlin bring a civil case against Moore, Reedy, and REI. On the basis of Moore' evidence, the Court cannot find that this was indeed the postal inspectors' motive, but accepts this allegation as true for purposes of deciding the motion for judgment on the pleadings filed by defendant United States. *See* Fed. R. Civ. P. 12(c). Valder and the postal inspectors' disclosures of grand jury information to Spartin and Carlin and their coercion of witnesses Spartin and Bray constitute the primary facts upon which Moore's remaining *Bivens* and FTCA claims rest.

B. *Procedural History*

In November 1991, Moore filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and the postal inspectors alleging among other torts malicious and retaliatory prosecution under *Bivens*. This case was subsequently transferred to this Court in September 1992. On October 14, 1992, Moore filed a second complaint in the Northern District of Texas against the United States pursuant to the FTCA, 28 U.S.C. §§ 2671 et seq., setting forth claims for malicious prosecution, false arrest, abuse of process, and various constitutional torts. The second case was also transferred to this Court and consolidated with the first case.

The U.S. District Court for the Northern District of Texas dismissed the *Bivens* claim against Valder, finding him protected by absolute immunity. The district court transferred the *Bivens* claims against the postal inspectors to this Court for lack of in personam jurisdiction and transferred the FTCA claim against the United States to this court as well. After denying Moore's motion to return the complaints to the Northern District of Texas, this Court dismissed the *Bivens* claims against the postal inspectors because Moore's complaint failed to meet a heightened pleading standard. This Court also dismissed the FTCA claims against the United States for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the "discretionary function" exception of the FTCA. *See* 28 U.S.C. § 2680(a).

Moore subsequently appealed the dismissals of his claims against Valder, the postal inspectors, and the Untied States to the D.C. Circuit. The D.C. Circuit affirmed some of the dismissals, but remanded some of the claims against Valder, the postal inspectors, and the United States, *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). These claims had been dismissed under the standard set by Federal Rule of Civil Procedure 12(b)(6).[5] On appeal, the D.C. Circuit "accept[ed] the

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[5] If a plaintiff fails to state a claim upon which relief can be granted, the court must dismiss the claim. *See* Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice." *E.E.O.C. v. St. Frances Xavier Parochial School*, 117 F.3d 621, 625 (D.C. Cir. 1997). The "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kowal v.*

facts alleged in [Moore's] complaint" and reviewed the district court's Rule 12(b)(6) dismissals de novo. *Moore*, 65 F.3d at 192.

The findings of the D.C. Circuit under Rule 12(b)(6) therefore evaluated only the legal sufficiency of Moore's allegations rather than Moore's evidence to support those allegations, which is what this Court must consider when deciding defendants' motions for summary judgment under Federal Rule of Civil Procedure 56.[6] Allegations that can survive a Rule 12(b)(6) motion will not necessarily survive a motion for summary judgment under Rule 56. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689-90 n.15 (1973); *Wilderness Society v. Griles*, 824 F.2d 4, 15 (D.C. Cir. 1987) (noting that "while a motion of dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). Furthermore, the "heightened pleading standard" applied in the D.C. Circuit's opinion in *Moore v. Valder* was unanimously rejected by the D.C. Circuit in *Crawford-El v. Britton*, 93 F.3d 813, 829 (D.C. Cir. 1996) (en banc), *cert. granted*, 117 S.Ct. 2451 (1997)

MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Additionally, "[t]he complaint must be 'liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Id.* (footnote omitted).

[6] While Rule 12(b)(6) motions are decided on the basis of the pleadings, Rule 56 summary judgment motions are decided on the basis of the pleadings and matters outside of them, such as supporting and opposing affidavits. In this case, the Court will have to consider the parts of Moore's affidavit and Rule 108(h) statement that this Court decides not to strike.

("*Crawford-El II*"). For these reasons, this Court will consider defendants' summary judgment motions in light of the D.C. Circuit's opinion in *Moore* and the standards set by Rule 56 and *Crawford-El II*.

Because Moore's claims rely on *Crawford-El II*, the Court must first describe the holdings of that case. Although there is no question that the D.C. Circuit rejected the "heightened pleading standard" in *Crawford-El II*, the parties dispute whether a majority o the Court of Appeals judges adopted a standard for constitutional tort cases requiring "clear and convincing evidence" of a defendant government official's unconstitutional motive. *Crawford-El II*, 93 F.3d at 821-24. United States Court of Appeals judges who have referenced *Crawford-El II* in their opinions believe the D.C. Circuit has adopted the clear and convincing standard.[7] Three district court judges within the D.C. Circuit have also reached this conclusion.[8]

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[7] *See, e.g., Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997); *McMillan v. W.E. Johnson*, 101 F.3d 1363, 1368-39 (11th Cir. 1996) (Propst, J., concurring).

[8] *See Byrd v. Moseley*, 942 F. Supp. 642, 645 (D.D.C. 1996) ("In Crawford-El v. Britton, the Court of Appeals for this circuit recently held that a '§ 1983 or *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the defendant's unconstitutional motive (where that is an element of the tort) by clear and convincing evidence' to withstand a motion summary judgment on the grounds of qualified immunity.") (quoting J. Ginsburg's concurrence); *Bridges v. Kelley*, 977 F. Supp. 503, 509 n.11 (D.D.C. 1997) ("Under the rule announced in Crawford-El, plaintiff must adduce clear and convincing evidence of motive on the part of the defendants.") (citation omitted); *District Council 20 v. The District of Columbia*, 1997 WL 446254, at *12-*13 (D.D.C. July 29, 1997) (applying first the "clear and convincing" test to

What is clear from *Crawford-El II* is that "Judge Ginsburg's separate opinion . . . . is controlling on [the issue of discovery] as the opinion consistent with the disposition on the narrowest ground." *Crawford-El II*, 93 F.3d at 829 (citing *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)). According to Judge Ginsburg, if a plaintiff facing a summary judgment motion cannot establish clear and convincing evidence of the defendant's unconstitutional motive, the motion should be granted unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Id*, at 841 (Ginsburg, J. concurring). If the plaintiff can demonstrate this "reasonable likelihood," he should be allowed to pursue "limited discovery." *Id.*

Because Moore's retaliatory prosecution claims against Valder and the postal inspectors constitute motive-based constitutional tort actions, this Court must apply *Crawford-El II* to defendants' summary judgment motions. The Court will apply the case in the following manner. First, the Court will look to see if Moore has "clear and convincing" evidence of defendants' retaliatory motive to withstand their summary judgment motions. If Moore cannot meet this standard, then the Court will apply Judge Ginsburg's standard to determine whether Moore should nonetheless be permitted to pursue limited discovery on the motive issue. Before turning to defendants' dispositive motions, however, the Court will first decide whether to grant

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determine whether summary judgment should be granted and then Judge Ginsburg's test to see if discovery was warranted).

Valder and the postal inspectors' motions to strike Moore's amended affidavit and 108(h) statement.

II. DISCUSSION

A. *Postal Inspectors' and Valder's Motions to Strike Moore's Amended Affidavit and Local Rule 108(h) Statement*

On February 25, 1997, this Court issued an Order striking Moore's affidavit of June 30, 1990, and his Statement of Material Facts as to Which There Exists a Genuine Issue to be Litigated ("108(h) statement") filed in opposition to the Postal Inspectors' Motion for Summary Judgment, because the former did not comply with Federal Rule of Civil Procedure 56(e) and the latter did not comply with Local Rule 108(h). Moore filed an amended 108(h) statement and an amended affidavit in opposition to the postal inspectors' summary judgment motion. Moore subsequently filed the same amended documents in opposition to Valder's summary judgment motion. Both the postal inspectors and Valder have moved to strike the amended affidavits and amended 108(h) statements filed in opposition to their respective motions for summary judgment. As the amended affidavits and 108(h) statements are "in all material respects identical" and allegedly suffer from the same defects,[9] the Court will address the postal inspectors' and Valder's motion to strike simultaneously.

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[9] In his motion to strike Moore's amended affidavit and 108(h) statement, Valder indicated that he joins in the arguments made in the postal inspectors' memoranda supporting their second motion to strike.

The postal inspectors and Valder ask the Court to strike Moore's entire affidavit and the entire 108(h) statement, alleging that significant parts of them do not comport with FRCP 56(e) and Local Rule 108. Although the Court has the discretion to strike Moore's amended affidavit and 108(h) statement in their entirety as it did in its Order of February 25, 1997, the Court finds that Moore made an effort to comply with its Order and it is not necessary to strike the amended submissions altogether. The Court therefore strikes only those portons of the affidavit and 108(h) statement that are inadmisible for the reasons explained below. *See Casas Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 682 (1st Cir. 1994).

The postal inspectors and Valder argue that Moore's amended affidavit contains statements that are not based upon his personal knowledge. Federal Rule of Civil Procedure 56(e) provides in relevant part that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers thereof references to in an affidavit shall be attached thereto or served therewith.

The postal inspectors and Valder claim that Moore's amended affidavit continues to rely on hearsay statements and factual assertions not bases upon Moore's personal knowledge. Under Rule 56(e), the facts set forth in affidavits submitted in opposition to a summary judgment motion must be "such as would be admissible

in evidence." *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949).

Moore argues that the Court should permit hearsay statements in his affidavit and 108(h) statement because formal discovery has yet to take place in this case. He cites a 1991 D.C. Circuit case indicating that "[i]nadmissible hearsay reports of the defendant's *specific* statements indicating malicious intent" can meet the Circuit's heightened pleading standard[10] when discovery has not yet occurred. *See Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 818 (1992) ("*Crawford-El I*"). The heightened pleading standard applied in *Crawford-El I*, however, was replaced with new standards in *Crawford-El II*, as explained above. *See Crawford-El II*, 93 F.3d at 815. Applying the standards of *Crawford-El II*, this Court will not consider hearsay statements in Moore's affidavit or 108(h) statement because such statements are neither "evidence" nor "facts to which he can credibly attest." *Id.* at 841.

Paragraphs 25 and 35 of Moore's Amended Affidavit

In paragraph 25, Moore states: "I was later informed that Mr. Valder and the inspectors characterized my answers as the 'biggest ___ing lies a man can tell.'"

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[10] The heightened pleading standard in *Crawford-El I* "insist[ed] that, before discovery, plaintiffs suing government officers fro damages set forth 'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim, and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* at 1317. Because there has been no opportunity for discovery, "the heightened pleading requirement demands only that plaintiff 'relat[e] the pertinent information that is already in his possession.'" *Id.* at 1320 (citation omitted).

Moore openly admits that this assertion is based upon the report of others, not his own personal knowledge. Because the statement constitutes inadmissible hearsay under Federal Rule of Evidence 802, the Court strikes it. In paragraph 35, Moore references assertions made in a trade journal editorial regarding the alleged "hatred" between REI and the top reaches of the Postal Service. Because these assertions are not based on Moore's personal knowledge, but rather on an editorial, they must also be struck for noncompliance with Rule 56 (e). As a result of striking paragraph 35 and Exhibit 3 of Moore's affidavit, the Court also strikes the second sentence of statement 15 in Moore's 108(h) statement, which relies on the affidavit.

Paragraphs 21 and 22 of Moore's Amended Affidavit

In Paragraph 22, Moore states that former PMG William Bolger and Former Assistant PMG James Jellison were "aware of my sharp criticism [of the USPS optical character reading procurement strategy] and that I had taken the matter to Congress." While defendants concede that Moore can testify to another person's state of mind if his testimony were based upon personal observation, they claim that Moore failed to state facts in his affidavit demonstrating that requisite foundation. *See Securities and Exchange Comm'n v. First City Financial Corp., Ltd*, 688 F. Supp. 705, 720 (D. D.C. 1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989); Fed. R. Evid. 602. Moore counters that paragraph 21 shows that he told Bolger of his intent to approach the USPS Board of Governors and the U.S. Congress to stop the single-line ZIP+4 implementation. In the Court's view, paragraph 21 shows that Bolger and Jellison were aware of Moore's criticism and permit the

reasonable inference that they knew he went to Congress. The Court will not strike paragraph 22.

Paragraphs 26, 27, 29, 30, 32, and 39 of Moore's Amended Affidavit

With respect to paragraphs 26, 27, 29, 30, 32, and 39, defendants against contend that they are not based on Moore's personal knowledge, but rather on testimony of others at his trial or on speculation as to why certain allegations were included in his indictment. The Court agrees that Moore lacks personal knowledge of why and how his indictment was prepared and will strike speculative statements in paragraph 26. As for statements in the challenged paragraphs referencing testimony at Moore's criminal trial, Moore must cite the trial transcript to support his 108(h) statement and cannot rely on his own affidavit for such support. Thus, Moore's references to what the Court found in his trial and what Moore "learned" from observing trial testimony must be struck from his affidavit. However, this does not preclude Moore from citing the trial record directly in support of his 108(h) statement, which Moore has done. Thus, although the Court strikes parts of paragraph 26 and all of paragraph 27, 31, and 32 of Moore's affidavit, the Court upholds Moore's citations to the "McIntosh Notes," the Trial Transcripts, and the Spartin Polygraph found in his 108(h) statement.

The Court also finds that paragraphs 29 and 32 are not based on Moore's personal knowledge and therefore strikes them. Both paragraphs contain statements that rely upon the statements of others made at trial or elsewhere. This reliance violates Rule 56(e) because "[p]ersonal knowledge may not be based upon the statements of another." *Securities & Exchange Com-*

mission v. First City Financial Corp., Ltd., 688 F. Supp. 705, 720 (citation omitted), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989). While Moore can cite information contained in the trial transcript or district court opinion issued in his criminal case[11] to support his 108(h) statement, such information does not constitute his personal knowledge and therefore must be struck from his affidavit.

The Court also strikes paragraph 39 because Moore once again cites the statement of another as is own, this time the affidavit of William C. Hittinger. Moore can cite and has cited the Hittinger Affidavit directly to support statement 28 of his 108(h) statement. The Hittinger Affidavit asserts that AUSA Valder did not care whether Moore was guilty because he needed "a track record and some notoriety which would help him obtain a good position in private practice." Hittinger Affidavit at ¶ 6. According to Hittinger, AUSA Valder said this in his company and that of several postal inspectors, who did not respond to the comment. The Court will consider the Hittinger Affidavit in deciding the summary judgment motions.

Paragraphs 40 and 17 of Moore's Amended Affidavit

In paragraph 40 of his affidavit, Moore attempts to allege evidence of malicious intent on the part of the defendants. Most of the statements this paragraph, however, constitute mere opinion and speculation about the state of mind of the defendants and are not supported by Moore's personal knowledge. For these reasons, the Court strikes all the paragraph 40, except for Moore's personal observations that USPS manage-

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[11] *United States v. Recognition Equipment, Inc.*, 75 F. Supp. 587 (D.D.C. 1989).

ment appeared angered by his criticism of them and that the postal inspectors appeared hostile to him during the USPS investigation of him. Lastly, the Court strikes PMG Bolger's 1982 statement about "bad blood" between USPS and REI referenced in paragraph 17 of Moore's affidavit, because although the statement satisfies the personal knowledge requirement of rule 56(e), the statement constitutes inadmissible hearsay.

Moore's Amended 108(h) Statement

Having struck several paragraphs of Moore's affidavit, the Court now looks to Moore's 108(h) statement. The importance of filing a proper Rule 108(h) statement is well established. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). Strict compliance with the Local Rule is necessary because courts rely upon the statement to distinguish disputed from undisputed facts and to identify the pertinent parts of the record. *Id.*

The Court finds the sections of Moore's 108(h) statement entitled "the Strained Relationship between REI and the USPS" and "The Postal Inspector's Abusive Conduct" to be problematic because they are argumentative and conclusory. A Rule 108(h) statement should be struck when it "blend[s] factual assertion with legal argument." *Id.* at 153. Many instances in these sections of Moore's 108(h) statement characterize, rather than merely assert, material facts. For instance, the word "abusive" in the heading must be struck, as well as statements such as "the postal inspectors employed *improper* techniques" (statement 23), "the Postal Inspectors and . . . Valder also attempted to *coerce* witnesses into false testimony" (statement

24(b)), "[i]n order to *coerce* Spartin into inculpating Moore," and "[i]n order to *trick* Spartin into inculpating Moore" (statement 24(c)). These statements not only use argumentative language but also presume knowledge of the defendants' state of mind, and therefore must be struck. The Court also finds that statement 36[12] is argumentative and therefore strikes it.

Having struck paragraph 17 and most of paragraph 40 of Moore's affidavit, the Court must also strike the parts of statement 16 in the 108(h) statement that rely on such paragraphs. While the Court finds that paragraphs 21 and 22 support a finding that the reationship between REI and the USPS was "strained" during parts of Moore's tenure with REI, the Court strikes the language alleging that the relationship was strained "before" Moore's arrival and "worsened after it." Paragraphs 21 and 22 show merely that Bolger and Jellison knew of Moore's criticism of USPS and appeared "upset" to Moore.

Upon consideration of defendants' motions to strike Moore's amended affidavit and 108(h) statement, memoranda in support and in opposition, and the entire record, the Court grants the motions in part, and denies them in part, as indicated in the paragraphs above. On the basis of what remains of the 108(h) statement and the supporting exhibits, including what is left of Moore's affidavit, the Court will decide whether to grant the summary judgment motions of Valder and the postal inspectors with respect to the *Bivens* claims remanded by the D.C. Circuit. The Court will conclude

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[12] Statement 36 reads: "The Postal Inspectors have not submitted any proof evidencing a legitimate motive for the investigation and indictment of William G. Moore, Jr."

by deciding whether to grant judgment on the pleadings in favor of the United States with respect to Moore's FTCA claims remanded by the D.C. Circuit.

B. *Valder's Summary Judgment Motion With Respect to the Remanded Bivens Claims and Moore's Motion To Clarify Order of September 16, 1996, Staying Discovery*

The United States District Court for the Northern District of Texas found that Valder was protected by absolute immunity from the *Bivens* claims brought against him and granted Valder's motion under Federal Rule of Civil Procedure 12(b)(6). That case was transferred to this Court and on appeal, the D.C. Circuit held that absolute immunity protects Valder from liability for some of his conduct, but not all of it, and remanded part of the case that had been improperly dismissed under Rule 12(b)(6). *See Moore* v. *Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995). The D.C. Circuit held that Valder was not liable for "the decision to prosecute Moore" nor "for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes." *Id.* Valder, however, does not enjoy absolute immunity for "intimidating and coercing witnesses into changing their testimony" and "disclosing grand jury testimony to unauthorized third parties" because this conduct is not "advocacy." *Id.* at 194-95. The D.C. Circuit noted that Valder is entitled to any qualified immunity available to the postal inspectors." *Id.* at 195 n.8.

The issue for this Court on remand is whether Valder's alleged conduct of coercing witnesses and

disclosing grand jury testimony can establish a *Bivens* claim for retaliatory prosecution.[13] In his motion for summary judgment, Valder first argues that Moore cannot establish an essential element of his claim for retaliatory prosecution because the absolute immunity doctrine protects Valder's decision to prosecute Moore. Valder also argues that the qualified immunity doctrine protects him from any liability arising out of forcing witnesses to change their testimony and unauthorized disclosures of grand jury material. The Court finds the first argument persuasive and therefore does not reach the second. For the reasons given below, the Court will grant Valder's summary judgment motion.

On appeal from the dismissal of Moores claims against Valder, the D.C. Circuit accepted the facts as alleged in Moore's complaint and reviewed the Rule 12(b)(6) dismissal de novo. *See Moore*, 65 F.3d at 192. The findings of the D.C. Circuit under Rule 12(b)(6) standards reflect a different evidentiary basis than that required by Valder's motion for summary judgment under Federal Rule of Civil Procedure 56. Under Rule 12(b)(6), the Court construes the *allegations* in the complaint liberally and draws all inferences therefrom in favor of the plaintiff to see if he or she has stated a claim upon which relief can be granted. *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Under Rule 57, the Court does not accept the complaint as true but rather looks at the plaintiff's *evidence* to see if there is a genuine issue of material fact requiring resolution at trial. *See* FED. R. CIV. P. 56(c)-(e). The D.C. Circuit therefore applied a more

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[13] Moore concedes in his Opposition to Valder's summary judgment motion that the only remaining claim against Valder is one of retaliatory prosecution.

lenient standard than this Court must apply under Rule 56. Additionally, the "heightened pleading standard" applied in the D.C. Circuit's opinion has been unanimously rejected by the D.C. Circuit in *Crawford-El II*, 93 F.3d at 829. To account for these differences, this Court will consider defendants' summary judgment motions in light of the standards set by Rule 56 and *Crawford-El II*, as well as the findings of the D.C. Circuit in *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995).

The Court should grant a summary judgment motion whenever the evidence shows that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Only a factual dispute that "might affect the outcome of the suit under the governing law" can preclude summary judgment. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must identify the absence of sufficient evidence on an essential element of the nonmoving party's case. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party "may not rest upon mere allegations or denial of [his] pleading, but [his] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmoving party fails to do this, summary judgment must issue in favor of the moving party. The Court must believe the evidence presented by the nonmoving party and draw all reasonable inferences from it. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 266 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Valder argues that he is entitled to summary judgment as a matter of law because Moore cannot make out an essential element of retaliatory prosecution, which is Moore's only remaining claim against him. An essential element of a *Bivens* claim for retaliatory prosecution is that the defendant brought the prosecution in question in order to retaliate against the individual for exercising his First Amendment rights. *See Haynesworth* v. *Miller*, 820 F.2d 1245, 1257 n.93 (D.C. Cir. 1987). To overcome a motion for summary judgment, Moore would have to come forward with clear and convincing evidence from which a reasonable trier of fact could find that Valder brought the prosecution with the purpose of retaliating against Moore for his criticism of USPS. *See Crawford-El II*, 93 F.3d at 829.

According to Valder, he cannot be held liable for retaliatory prosecution because this claim inherently relies on his decision to prosecute Moore, which is absolutely protected by prosecutorial immunity. *See Moore*, 65 F.3d at 194. This holding implies that Moore cannot base any claim for damages on Valder's decision to prosecute Moore. This implication is supported by another D.C. Circuit case, in which the plaintiffs could not bring a malicious prosecution claim against an Attorney General because "instituting a criminal action" was both an essential element of the claim and an absolutely protected activity. *Dellums* v. *Powell*, 660 F.2d 802, 805-06 (D.C. Cir. 1981).[14] Although the D.C. Circuit in *Moore* concluded that coercing witnesses and disclosing grand jury material are not absolutely protected activity, this activity by itself cannot

[14] The Court explained that this holding applied to both malicious prosecution and retaliatory prosecution claims based on the First Amendment. *See Dellums*, 660 F.2d at 806.

satisfy the essential elements of a claim for retaliatory prosecution because that claim requires that Valder caused Moore's prosecution. *See Dellums* v. *Powell*, 566 F.2d 167, 191 n.65 (D.C. Cir. 1977). While Valder did initiate and continue the prosecution of Moore, thereby satisfying one of the elements of retaliatory prosecution, the D.C. Circuit has made clear that liability cannot rest on this conduct. *Moore*, 65 F.3d at 194 ("prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to prosecute Moore"). *See also Dellums*, 660 F.2d at 806 ("[n]ever has a prosecutorial official been held liable for causing a prosecution to be brought").

Because the doctrine of absolute immunity precludes Moore from establishing an essential element of his retaliatory prosecution claim, there is no genuine issue as to any material fact and Valder is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 323.[15] Even if Moore had evidence from which a reasonable trier of fact could find that Valder did coerce witnesses and disclose grand jury material in order to incriminate Moore, this conduct by itself could not constitute retaliatory prosecution until Valder decided to initiate the prosecution of Moore. At that point, however, Valder's conduct became absolutely protected, thereby foreclosing a claim for re-

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[15] The U.S. Supreme Court explained that when a party cannot establish an essential element of her claim, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

taliatory prosecution. *See Dellums*, 660 F.3d 806. Moore suffered no injury from Valder's alleged coercion of witnesses and disclosure of grand jury material until the fruits of that conduct were used against him before the grand jury and at trial. Yet, as soon as Valder began deciding what information to present to the grand jury and at trial, his conduct became absolutely protected. *See Moore*, 65 F.3d at 194 ("Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of 'initiating a prosecution' and 'presenting the State's case.'") (citations omitted).

Thus, even though the D.C. Circuit held that some of Valder's conduct was not absolutely protected and remanded that part of the case, what is left of the case cannot meet the elements of a *Bivens* claim for retaliatory prosecution. This situation resembles that in *Buckley* v. *Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). The United States Supreme Court had remanded parts of the case back to the Seventh Circuit, including Buckley's claim that the prosecutors violated his Due Process rights by coercing two witnesses and paying them money to implicate Buckley in their statements. *See Buckley* v. *Fitzsimmons*, 509 U.S. 259, 279 (1993).[16]

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[16] The Supreme Court found that: "The precise contours of these claims are unclear, and they were not addressed below; we leave them to be passed on in the first instance by the Court of Appeals on remand." *Id.* The Supreme Court also held that the prosecutors' alleged misconduct, when trying to determine whether a bootprint at the scene of the crime had been left by Buckley, was an investigatory rather than a prosecutorial function, entitled to only qualified immunity, and that the prosecutor's allegedly false statements to the press were entitle to only qualified, and not absolute, immunity from Section 1983 liability.

On remand, the Seventh Circuit found that this conduct was not entitled to absolute immunity because the interrogation and payments occurred early in the investigation, before the prosecutors were functioning as advocates. *See Buckley*, 20 F.3d at 794. When the Court proceeded to the question of whether coercing witnesses to incriminate Buckley was entitled to qualified immunity, the Court concluded that such conduct did not violate any clearly established right of Buckley and dismissed the claim based on that conduct. *Id.* at 794-95.

The Court noted that while the prosecutors' coercion could violate the constitutional rights of the *witnesses*, it did not violate Buckley's right and did not give him a claim against the prosecutors. *Id.* at 194-95. The Court explained:

> [I]f the constitutional entitlement is the right to prevent use of the [coerced] confession at trial (or before the grand jury), then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confessions is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity. Because the "reliability" aspect of coerced-confession law is an element of trial practice . . . the only way Buckley can establish a violation of the Constitution is to plead himself out of court. Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs.

Id. at 795 (citations omitted) (emphasis added). For similar reasons, Moore cannot base a retaliatory prose-

cution claim upon Valder's alleged coercion of witnesses and disclosures of grand jury testimony to witnesses without pleading himself out of court. To establish the claim, Moore must show that Valder *used* the witness statements procured through this wrongful conduct in the grand jury and trial proceedings in order to prosecute Moore in retaliation for his criticism of USPS. However, as soon as Moore alleges this, he confronts the absolute immunity doctrine which effectively prohibits his claim.

Finding that absolute prosecutorial immunity precludes Moore from establishing an essential element of a *Bivens* claim for retaliatory prosecution against Valder, the Court does not address the merits of Valder's qualified immunity defense. The Court grants Valder's motion for summary judgment and denies Moore's Motion To Clarify Order of September 16, 1996, Staying Discovery as moot.[17]

C. *The Remanded Bivens Claim of Retaliatory Prosecution Against the Postal Inspectors*

On September 24, 1993, this Court dismissed the *Bivens* claims against the postal inspectors on the grounds that Moore's complaint had not met a heightened pleading standard. On appeal, the D.C. Circuit concluded that this Court should have decided if the

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[17] This Order granted defendant postal inspectors' motion to stay discovery to permit them to file a motion for summary judgment based on the D.C. Circuit's opinion in *Crawford-El II*. Moore's motion asked the Court to clarify whether this Order applied to Valder or whether discovery could proceed on Moore's claims against Valder. In light of the Court's grant of summary judgment in favor of Valder, the issue of whether discovery can proceed against Valder is moot and the motion is thus denied.

Bivens claims alleged violations of clearly established law before it reached the heightened pleading standard issue. *See Moore*, 65 F.3d at 195. The D.C. Circuit then held that it was snot clearly established that malicious prosecution violates any constitutional or statutory right and affirmed the dismissal of Moore's malicious prosecution claim against the postal inspectors. *See id.* at 195-96. However, the Court of Appeals reversed the dismissal of Moore's retaliatory prosecution claim, finding that retaliation for speech protected by the First Amendment violates a clearly established right. It also found that Moore met the Circuit's two-level heightened pleading standard, articulated in *Kartseva* v. *Dep't of State*, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994).[18] *See id.* at 196.

This Court acknowledges the D.C. Circuit's finding that retaliatory prosecution violates a clearly established right, but revisits its finding that Moore met the heightened pleading standard in *Kartseva* in light of intervening D.C. Circuit precedent and the higher evidentiary burden required by Federal Rule of Civil Procedure 56. The two-level heightened pleading standard articulated in *Kartseva* for claims involving

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[18] In *Kartseva*, the D.C. Circuit explained the two levels as follows:

> The first level applies to all *Bivens* or § 1983 claims and demands that plaintiffs plead the facts surrounding the alleged violation with sufficient "detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial" over a qualified immunity defense. The second level of our heightened pleading standard applies only to claims in which the outcome depends on the defendant's state of mind, and it demands direct evidence of intent.

Kartseva, at 130-31 (citations omitted).

unconstitutional motives by government officials that the D.C. Circuit relied upon in Moore's appeal has been replaced by the standards articulated in *Crawford-El II*. Consequently, this Court reviews what is left of Moore's 108(h) statement and affidavit under the standards set fort in *Crawford-El II* to decide whether to grant the postal inspectors' motion for summary judgment on the *Bivens* claim for retaliatory prosecution.

According to *Crawford-El II*, a plaintiff opposing a summary judgment motion based upon a qualified immunity defense with respect to a motive-based constitutional claim must produce "clear and convincing proof of a defendant's unconstitutional motive." *Crawford-El II*, 93 F.3d at 838-39 (Ginsburg, J., concurring). If the plaintiff cannot meet the "clear and convincing" standard, the Court should grant summary judgment unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Id.* at 841. If Moore's evidence against the postal inspectors meets the reasonable likelihood" standard, the Court will allow him to pursue "limited discovery." *Id.*

First, the Court asks if Moore can meet the "clear and convincing" standard. In their motion for summary judgment, the postal inspectors claim that under this new standard, Moore cannot establish that they had an unconstitutional motive, which is an essential element of a retaliatory prosecution claim. *See Haynesworth* v.

Miller, 820 F.2d 1245, 1257 n.93 (D.C. Cir. 1987).[19] To overcome the postal inspectors' summary judgment motion, Moore must come forward with specific facts from which a rational trier of fact could find by clear and convincing evidence that the postal inspectors possessed the motive of retaliating against Moore for his criticism of USPS. *See* FED. R. CIV. P. 56(e). As the D.C. Circuit has explained: "[T]he clear and convincing standard generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." *United States* v. *Montague*, 40 F.3d 1251, 1254 (D.C. Cir. 1994) (citations omitted). The Court applies this standard to the remaining parts of Moore's 108(h) statement and affidavit to see if Moore has sufficient evidence that the postal inspectors possessed the requisite unconstitutional motive for a retaliatory prosecution claim.

The Court finds that Moore's amended 108(h) statement and affidavit establish the following facts with respect to the issue of motive. Moore voiced his criticism of USPS directly to USPS management, the media, and Congress in 1983. Members of USPS man-

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[19] The essential elements of a retaliatory prosecution claim under *Bivens* are: "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." *Haynesworth*, 820 F.2d at 1257 n.93 (quoting *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir. 1979)). If the plaintiff can establish these two elements, then the Court should consider a third: "whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered." *Id.*

agement, specifically PMG Bolger and Bolger's deputy, Jellison, were aware of Moore's criticism. In 1983, Bolger told Moore to "back off" of his criticism of USPS management, and Jellison said REI would never get any multi-line production awards while he was at USPS. In 1985, Moore lobbied to have Jellison and Bolger's successor as PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That year, USPS began investigating REI for problems in their procurement process.

The postal inspectors participated in the investigation of REI and worked with Valder to obtain an indictment against Moore. The postal inspectors appeared hostile to Moore during the investigation. In the presence of the postal inspectors, Valder told William Hittinger that he did not care whether Moore was guilty or innocent because he needed to establish a good track record as a prosecutor. The postal inspectors did not repudiate Valder's comment. After Moore was indicted, but before he was tried, the Assistant PMG for Procurement insisted that Moore be put on leave of absence from REI, that he be terminated from REI, that REI not pay his legal fees, that he not be able to profit from any appreciation in REI stock, and that he lose all of his CEP perquisites. In response to this pressure, REI cut Moore's salary, bonuses, and privileges.

The Court of Appeals found that "[t]hese facts taken together constitute evidence sufficient to meet" the heightened pleading standards articulated in *Kartseva* v. *Moore*, 65 F.3d at 196. As *Crawford-El II* now applies to this case, this Court must determine whether these facts are sufficient to meet the new standard: whether they constitute clear and convincing evidence

of a retaliatory motive by the postal inspectors. Although Moore's evidence suggests that Bolger and Jellison were angry at Moore and were implicitly threatening him, this evidence does not show that *the postal inspectors* were upset with him. The evidence about Bolger and Jellison suggests that USPS management disliked Moore's public criticism of it and may have had a motive to retaliate against him by pursuing a baseless investigation and ultimate prosecution of him. However, while it is possible that management expressed this motive to the postal inspectors, Moore's evidence does not provide clear and convincing evidence that the postal inspectors themselves had a retaliatory motive.

Second, then, the Court must ask if Moore can show that he has a "reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Crawford-El II*, 93 F.3d at 841 (Ginsburg, J. concurring). Other facts show that Moore does meet this *Crawford El II* standard for "limited discovery." *Id.* The fact that the postal inspectors report to USPS management shows that they were likely aware of and influenced by management's hostility to Moore and REI. Moore's observations of the postal inspectors' hostility toward him during the USPS investigation supports this inference. In addition, the postal inspectors' failure to repudiate Valder's comment that he did not care whether Moore was guilty or not may mean they were also indifferent to Moore's innocence. This reasonable inference is supported by the postal inspectors' conduct in coercing Spartin to implicate Moore even after he had said nineteen times during his polygraph examination that Moore was not involved,

and their similar attempts to coerce Bray into implicating Moore. The postal inspectors' concealment of exculpatory evidence from the grand jury and their drafting and presentation of misleading witness statements also suggest a desire to get Moore prosecuted even if he were innocent. Lastly, the fact that the postal inspectors showed former PMG Carlin secret grand jury information suggests that they were trying to help Carlin in his civil case against Moore stemming from Moore and REI's efforts to get Carlin dismissed from USPS.

While these facts do not provide "clear and convincing" evidence that the postal inspectors sought Moore's prosecution in order to retaliate against him, the Court finds that they do show Moore that "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof" that the postal inspectors sought to prosecute Moore in retaliation for his public criticism of USPS. *Crawford El II*, 93 F.3d at 841. The Court will therefore permit "limited discovery" with respect to Moore's *Bivens* claim for retaliatory prosecution against the postal inspectors. *Id.* Specifically, the Court will permit discovery tailored to the issue of whether the postal inspectors had the requisite retaliatory motive based on Moore's criticism of USPS.

The Court's decision to permit limited discovery is consistent with the D.C. Circuit's decision to remand Moore's retaliatory prosecution claim against the postal inspectors. *See Moore*, 65 F.3d at 196. In fact, at a status conference held in this Court on April 25, 1996, defense counsel admitted that the D.C. Circuit's holdings implied that discovery should proceed, stating that "we fully agree that document production should go

forward." 4/25/96 Hr. Tr. at 20. Magistrate Judge Kay had even ordered discovery to commence on October 14, 1996, but the decision in *Crawford El II* required staying discovery until this Court could determine whether the new standards permitted the planned discovery. This Court concludes that discovery is warranted under the new standards and refers this case to Magistrate Judge Kay to oversee discovery on Moore' *Bivens* claim for retaliatory prosecution against the postal inspectors.

D. *The Remanded FTCA Claims Against the United States*

On the basis of the alleged conduct of Valder and the postal inspectors described above, Moore brought claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq. The FTCA waives the sovereign immunity of the United States in legal actions based on negligence or wrongful conduct of federal government employees. *See* 28 U.S.C. §§ 2671-2680. This waiver is subject to certain exceptions, including the "discretionary function" exception, which insulates the United States against liability arising out of an act or omission of a government employee exercising or failing to exercise a discretionary function. *See* 28 U.S.C. § 2680(a). On September 24, 1993, this Court held that Valder and the postal inspectors' alleged misconduct fell within the discretionary function exception and consequently dismissed Moore's FTCA claims for lack of subject matter jurisdiction.

On appeal, the D.C. Circuit held that "the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses

into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment." *Moore*, 65 F.3d at 197. The D.C. Circuit agreed that these activities fell within the FTCA's discretionary function exception, noting that:

> deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a Brady request are actions that require the prosecutor to exercise his professional judgment.

Id. However, the D.C. Circuit found that "[d]isclosing grand jury testimony to unauthorized third parties . . . is not a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Id.* The Court of Appeals instructed this Court to reconsider the alleged disclosures of grand jury material, but warned that it "express[ed] no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence." *Id.*

The Court of Appeals' opinion disposes of all of the allegations against the United States in Moore's FTCA Complaint other than paragraph 26 which alleges that Valder and the postal inspectors violated Federal Rule of Criminal Procedure 6(e) by disclosing grand jury testimony to two unauthorized third parties. *See id.* at 197; FTCA Complaint at ¶ 26. Specifically, the Complaint makes two claims: one of malicious prosecution

and one of abuse of process. First, the Complaint alleges that Valder and the postal inspectors gave William Spartin, the president of GAI and the prosecution's primary witness against Moore, access to "Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony." FTCA Complaint at ¶ 26. In Moore's view, this alleged disclosure to Spartin constitutes malicious prosecution and renders the United States liable under the FTCA. Second, the Complaint alleges that Valder and the postal inspectors gave grand jury testimony of other witnesses and "a copy of a draft indictment" to former PMG Paul Carlin "for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service." *Id.* Moore argues that the unauthorized disclosure of grand jury information to Carlin establishes an abuse of process claim under the FTCA.

The torts of malicious prosecution and abuse of process cannot form the basis of an FTCA claim unless they were committed by "investigative or law enforcement officers of the United States government." *See* 28 U.S.C. § 2680(h).[20] According to the FTCA, a person is

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[20] Section 2680(h) reads:

> The provision of this chapter and § 1346(b) of this title shall not apply to any claim arising out of an assault, battery, false imprisonment, false arrest, *malicious prosecution, abuse of process*, libel, slander, misrepresentation, deceit, or interference with contract rights: provided, that, with regard to acts or omissions of *investigative or law enforcement officers of the United States government*, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, *abuse of process, or malicious prosecution.*

an "investigative or law enforcement officer" if empowered by law to execute searches, seize evidence, or make arrests for violations of Federal law. *See* 28 U.S.C. § 2680(h). As postal inspectors are authorized to perform all three functions, *see* 39 C.F.R. § 233.1 (1998), their alleged conduct can form the basis of Moore's FTCA claims for malicious prosecution and abuse of process. *See, e.g., Crow* v. *United States*, 634 F. Supp. 1085, 1088 (D. Kan. 1986). Valder's alleged conduct, however, cannot form the basis of either of Moore's FTCA claims because federal prosecutors cannot perform such functions and therefore are not "investigative or law enforcement officers" under § 26280(h).[21] Accordingly, the Court will not consider Valder's alleged disclosures of grand jury material in deciding the government's dispositive motion.

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, defendant United States moves for judgment on the pleadings with respect to Moore's remaining FTCA claims that the postal inspectors disclosed grand jury testimony to unauthorized third parties.[22]

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28 U.S.C. § 2680(h) (emphasis added).

[21] *See e.g., Bernard* v. *United States*, 25 F.3d 98 (2d Cir. 1994); *Ames* v. *United States*, 600 F.3d 183, 185 n.3 (8th Cir. 1979); *Gray* v. *Bell*, 542 F. Supp. 927, 932 (D.D.C. 1982), *aff'd*, 712 F.2d 490 (D.C. Cir. 1983). The Court follows the clear language of 28 U.S.C. § 2680(h) and the holdings in these cases and rejects Moore's argument that AUSA Valder be treated as an "investigative or law enforcement officer" because he was engaged in "investigative" activities when he allegedly disclosed grand jury materials.

[22] The United States also moves, in the alternative, for dismissal of the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In light of this Court's decision to grant the motion for judgment on the

The Court may grant a motion for judgment on the pleadings if, at the close of the pleadings, no material fact remains in dispute and the moving party is entitled to judgment as a matter of law. *Haynesworth* v. *Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). In considering such a motion, the Court must view the complaint in the light most favorable to the plaintiff and accept as true the factual allegations set forth therein and all reasonable inferences drawn from those allegations. *Id.*

Whether the postal inspectors' alleged disclosures of grand jury information to Spartin and Carlin establish actionable claims of malicious prosecution and abuse of process against the United States are the only FTCA issues facing this Court on remand. The Court will look first at the malicious prosecution claim and then the abuse of process claim to determine if the United States is entitled to judgment as a matter of law on either of these claims.

Malicious Prosecution

Defendant United States argues that Moore cannot establish the essential elements of his malicious prosecution claim on the basis of the postal inspectors' alleged disclosures of grand jury information to Spartin. The FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. *See* 28 U.S.C. § 1346(b). Under D.C. law, the tort of malicious prosecution has four elements: (1) the initiation or procurement of a criminal proceeding by the defendant against the plaintiff; (2) absence of probable cause for

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pleadings in favor of the United States, the alternative motion to dismiss for lack of subject matter jurisdiction is moot.

the proceedings; (3) termination of the proceeding in favor of the plaintiff; and (4) malicious intent on the part of the defendant. *See Davis* v. *Giles*, 769 F.2d 813, 814-15 (D.C. Cir. 1985); *accord Ammerman* v. *Newman*, 384 A.2d 637, 639 (D.C. App. 1978). Failure to satisfy any one of these four elements is "fatal" to a claim of malicious prosecution. *See Jarett* v. *Walker*, 201 A.2d 523, 526 (D.C. App. 1964) (citing *Bumphus* v. *Smith*, 189 A.2d 130, 131 (D.C. App. 1963)).[23]

According to defendant United States, Moore cannot satisfy the first element, that the postal inspectors initiated or procured Moore's prosecution, given the holdings of the D.C. Circuit in *Moore* v. *Valder*, 65 F.3d 189 (D.C. 1995). First, the D.C. Circuit made clear that the discretionary function exception applies to the "decision to prosecute and the presentation of evidence to the Grand Jury." *Moore*, 65 F.3d at 196-97 (citing *Gray* v. *Bell*, 712 F.2d 508, 516 (D.C. Cir. 1983)). Hence, even if the postal inspectors "decided to prosecute" Moore or "caused" him to be prosecuted by presenting Spartin's manipulated testimony to the Grand Jury, their conduct could not provide a basis for liability because such conduct is discretionary. Second, the postal inspectors' alleged disclosure of grand jury testimony to Spartin, which is the only non-discretionary conduct that this Court must consider on remand, cannot establish the first element given the D.C. Circuit's holding that such "unauthorized dis-

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[23] *Jarett* applies the elements of malicious prosecution under Maryland law instead of D.C. law, but as the District of Columbia Court of Appeals explains, "[t]he necessary elements to support a case for malicious prosecution are the same under Maryland law as recognized in this jurisdiction." *Jarett*, 201 A.2d at 526 (citations omitted).

closure 'does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions.'" *Moore*, 65 F.3d at 195 (quoting *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 278 (1993)).

Moore faces a third obstacle in trying to establish that the postal inspectors initiated or procured the prosecution of Moore, which the Court asked the parties to brief in its Order of September 26, 1997. That Order directed the parties to address the following question:

> If Assistant United States Attorney Valder is not an "investigative or law enforcement officer," provide authority for the proposition that the conduct of the postal inspectors alone can satisfy the elements of a malicious prosecution claim against the United States under the FTCA. Further support the proposition that an adequate casual nexus existed between the conduct of the postal inspectors and Assistant United States Attorney Valder's decisions to initiate and continue the prosecution of plaintiff Moore.

In the D.C. Circuit, a plaintiff alleging malicious prosecution under the FTCA must show "a sufficient causal nexus" between the acts of the defendant and the United States Attorney's decision to prosecute the plaintiff. *Dellums* v. *Powell*, 566 F.2d 167, 194 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) ("*Dellums I*"); *Dellums* v. *Powell*, 660 F.2d 802, 804 n.3 (D.C. Cir. 1981) ("*Dellums II*"). The law presumes that United States Attorneys act independently when they institute prosecutions unless the plaintiff can show "a chain of causation" between the defendant's conduct and the

initiation of the prosecution. *See Dellums I*, 566 F.2d at 192. If the United States Attorney's decision to prosecute was "independent of any pressure or influence exerted and of any misstatements" by the defendant, "the chain of causation . . . is broken." *Id.* at 193 (citations omitted).

Given that this Court lacks jurisdiction under the FTCA to base a malicious prosecution claim on AUSA Valder's conduct, *see* 28 U.S.C. § 2680(h), and that a malicious prosecution claims requires that the defendant "instituted or procured" the prosecution, Moore must show that the postal inspectors' alleged disclosures of grand jury testimony to Spartin played a sufficiently causal role in Valder's decision to prosecute Moore. In light of the D.C. Circuit holdings in *Moore* and *Dellums*, Moore tries to distinguish the actual decision to prosecute, which is clearly discretionary, from improper actions taken by the postal inspectors to initiate and continue Moore's prosecution. According to Moore, such actions include the postal inspectors' alleged efforts to mislead the grand jury into indicting Moore by concealing, distorting, and manufacturing evidence and their efforts to pressure Spartin into incriminating Moore by showing him grand jury statements drafted by the postal inspectors. Moore argues that these actions established the first element because the disclosure of the grand jury information caused Spartin to incriminate Moore in his testimony before the grand jury, "which in turn led to the grand jury indictment of Moore that continued the prosecution of Moore." Supplemental Brief at 11. Lastly, Moore asserts that "it makes no difference that AUSA Valder was, *for his own reasons*, determined to prosecute Moore" because "[t]he postal inspectors misconduct *continue* Mr.

Moore's prosecution *by influencing the grand jury, not Valder.*" *Id.* at 12 (emphasis added).

The Court finds that Moore has not established an adequate "causal nexus" between the postal inspectors' disclosure of grand jury information to Spartin and the initiation of Moore's prosecution. Moore has not alleged that the postal inspectors pressure Valder into prosecuting Moore or knowingly made misrepresentations to Valder that led him to prosecute Moore when he otherwise would not have. *See Dellums I*, 566 F.2d 193. In fact, Moore has conceded that the postal inspectors did *not* influence Valder's decision to prosecute, and that Valder was "determined to prosecute Moore" independent of their conduct. Moore has alleged only that the postal inspectors influenced the grand jury's decision to indict, claiming that Spartin's manipulated testimony "must have led the grand jury to indict Moore." Supplemental Brief at 10.

Moore's allegations ignore the fact that malicious prosecution requires the initiative of a prosecution by the Executive Branch, not the grand jury.[24] Even if this Court could determine that Spartin's testimony "caused" the indictment,[25] this would not satisfy the first element because a grand jury indictment cannot by

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[24] *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("The Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citations omitted); *In Re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988), *reversed on other grounds*, 487 U.S. 654 (1988) ("the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch").

[25] Moore concedes that "[i]t is, of course, impossible to gauge exactly the impact of Spartin's testimony." Supplemental Brief at 10 n.3.

itself initiate a prosecution.[26] Moreover, Moore's concession that Valder's decision to prosecute was independent of the postal inspectors' misconduct breaks whatever causal chain he sought to establish and thereby defeats his malicious prosecution claim under the FTCA. *See Dellums I*, 566 F.2d at 193.

The Court also finds that Moore cannot establish a casual chain between the postal inspectors' disclosure of grand jury testimony and the initiation of Moore's prosecution without relying on conduct that has already been declared protected by the FTCA's discretionary function exception. The disclosure is significant to a malicious prosecution claim only if it resulted in the initiation or procurement of Moore's prosecution. Moore claims the disclosure was made to pressure Spartin into implicating Moore during his grand jury testimony so that Moore would be indicted. Moore also claims that the postal inspectors presented Spartin's manipulated testimony to the grand jury and concealed his exculpatory statements in order to get Moore indicted and ultimately prosecuted.

This alleged conduct, however, cannot form the basis of a malicious prosecution claim because the Court of Appeals explicitly held that "the United States enjoys immunity from Moore's claims that Valder and the postal workers *pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create false impression of what he knew about the fraud schemes and withheld material exculpatory information* from him after the grand jury returned an

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[26] *See Unite States* v. *Cox*, 342 F.2d 167, 172 (5th Cir. 1965) (noting that a grand jury's decision to indict cannot cause a prosecution to be initiated because the prosecution must sign the indictment to institute proceedings).

indictment." *Moore*, 65 F.3d at 197 (emphasis added). This holding and Moore's concession that the postal inspectors did not influence Valder's decision to prosecute preclude Moore from establishing the causal chain required by the first element of malicious prosecution. The Court notes that if the disclosure of grand jury information by the postal inspectors occurred as alleged, it would constitute a reprehensible violation of Federal Rule of Criminal Procedure 6(e); however, the alleged disclosure is simply insufficient to support an FTCA claim for malicious prosecution.[27]

Abuse of Process

In its FTCA complaint against the United States, Moore alleges that the postal inspectors gave secret grand jury information, including witness statements and a draft indictment, to former PMG Carlin in order to help him pursue a civil action against Moore and REI for his dismissal from USPS. *See* FTCA Complaint at

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[27] Defendant United States also claims the allegations in the Complaint cannot satisfy the second element regarding lack of probable cause or the fourth element regarding malicious intent because of the "inherently discretionary nature" of such elements. The Complaint alleges that Valder and the postal inspectors knew Moore was innocent and yet deliberately misled the grand jury into indicting him. *See* FTCA Complaint at ¶ 21-28. Although Moore claims these allegations show the postal inspectors acted without probable cause and with malicious intent, Moore fails to address the Court of Appeals' holding that concealing, distorting, and withholding exculpatory evidence "to create a false impression of what he [Moore] knew about the fraud schemes" fell within the discretionary function exception of the FTCA. *Moore*, 65 F.3d at 197. Nevertheless, because this Court finds the malicious prosecution claim fails on the basis of the first element, it does not reach the issue of whether Moore can establish the other three elements.

¶ 26. Defendant United States contends that these allegations, even if true, do not satisfy the elements of an abuse of process claim[28] and that the United States is therefore entitled to judgment on the pleadings under Rule 12(c). As noted above, the FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. *See* 28 U.S.C. § 1346(b). Accordingly, the Court looks to D.C. law on the tort of abuse of process to decide the Rule 12(c) motion.

Under D.C. law, "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable." *Morowitz* v. *Marvel*, 423 A.2d 196, 198 (D.C. App. 1980). However, "the fact that a person acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding is insufficient to establish abuse of process." *Scott* v. *District of Columbia*, 101 F.2d 748, 755 (D.C. Cir. 1997). As the D.C. Circuit has made clear, "there is no action for abuse of process when the process is used for the purpose for which it is intended" even if there is an "incidental motive of spite or an ulterior purpose of benefit to the defendant." *Id.* (citation omitted). In other words, "'[n]o matter what ulterior motive may have prompted it,' . . . one who invokes the legal process to obtain such relief as it

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[28] Moore's abuse of process claim differs from his malicious prosecution claim in the following respect: "The essence of the tort is the use of legal process for improper purposes, and so abuse of process is conceptually different from, but overlaps with, malicious prosecution, the latter of which occurs only when a legal action is brought without probable cause." *Neumann* v. *Vidal*, 710 F.2d 856, 860 (D.C. Cir. 1983).

offers commits no abuse of process." *Harrison* v. *Howard Univ.*, 846 F. Supp. 1, 2-3 (D.D.C. 1993) (quoting *Morowitz*, 423 A.2d at 198), *aff'd*, 48 F.3d 562 (D.C. Cir. 1995). The plaintiff must show that defendant used some legal process "for an *immediate* purpose other than that for which it was designed and intended." *Scott*, 101 F.3d at 755 (citation omitted) (emphasis added).[29]

The D.C. Circuit recognizes that using the grand jury subpoena process for a single purpose other than investigating a crime or obtaining evidence relevant to a crime can constitute an abuse of process. *See, e.g.*, *Doe* v. *DiGenova*, 779 F.2d 74 (D.C. Cir. 1985). In *Doe* v. *DiGenova*, the plaintiff alleged that an Assistant United States Attorney abused the process of the grand jury by issuing a subpoena for veteran medical records "not to investigate the crime, but to evaluate the viability of a yet to be asserted insanity defense." *Id.* 91. The Court of Appeals remarked, that "[h]ad [exploration of Doe's possible insanity defense] been the *only* reason behind the subpoena, this Court would be troubled." *Id.* (emphasis added). On remand, however, the district court found there was no abuse of process because the prosecutor had subpoenaed the plaintiff's records for two reasons: to determine whether the plaintiff was defrauding the Veterans' Administration and whether the defense of insanity was available. The D.C. Circuit affirmed the lower court's finding that this use of the subpoena was "entirely

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[29] *See also Wilcon* v. *Traveler's Indemnity Company*, 654 F.2d 976, 984 (5th Cir. 1981) ("the plaintiff need only show that the defendant acted '*primarily*' to accomplish an *immediate* purpose for which the process was not designed") (quoting Restatement (Second) of Torts § 682 (1977)) (emphasis added).

consistent with the purpose of grand jury proceedings, which is 'to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.'" *Doe* v. *DiGenova*, 642 F. Supp. 624, 631 (D.D.C. 1986) (citation omitted), *aff'd sub nom. Doe* v. *Stephens*, 851 F.2d 1457, 1463 (D.C. Cir. 1988) ("we agree with the district court that this [abuse of process] claim affords no basis for relief").

Moore claims the postal inspectors misused the grand jury process to divulge secret information to Carlin in order to help him pursue a civil action against Moore. Applying D.C. law on abuse of process to Moore's Complaint and accepting his allegations as true in accordance with Rule 12(c), the Court finds that the postal inspectors improperly disclosed grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e) and possessed the "ulterior motive" of assisting Carlin's private suit. *See Scott*, 101 F.3d at 755. However, because there is no abuse of process under D.C. law if the legal process was used for its intended purpose, *see id.*, in order to prevail, Moore must allege that the postal inspectors did *not* use the grand jury process for its intended purposes of investigating potential crimes and identifying evidence for submission to the grand jury, but rather invoked the process for the sole and "immediate purpose" of obtaining information helpful to Carlin's case against Moore. *Id.*; *see Doe* v. *Di Genova*, 779 F.2d at 91.

The allegations in Moore's FTCA complaint do not establish an abuse of process claim.[30] Moore has not

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[30] The facts Moore alleges differ markedly from those in a case in which the court found the defendant's use of the subpoena process constituted abuse of process. The Court of Appeals of New York found that "on its face an allegation that defendants had

alleged enough facts to infer that the postal inspectors used the grand jury process to obtain witness statements and to draft an indictment for the sole and "immediate purpose" of assisting Carlin in his case against Moore, instead of for the process's intended purpose of investigating crimes and identifying evidence to present to the grand jury. Moore has alleged only that the postal inspectors gave Carlin access to secret information that had been obtained through the grand jury process in order to help him with his civil case. *See* FTCA Complaint at ¶ 26. Though this allegation satisfies the ulterior motive requirement, it fails to show the process was used solely for an "*immediate* purpose other than that for which it was designed or intended." *Scott*, 101 F.3d at 755; *see Doe* v. *DiGenova*, 779 F.2d at 91. As the holdings in *Scott*, *DiGenova*, and *Harrison* show, the postal inspectors could not have committed an abuse of process if they properly used the grand jury process to investigate crimes and identify evidence to present to the grand jury even though they

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subpoenaed 87 persons with full knowledge that they all could not and would not testify and that this was done maliciously with the intent to injure and to harass plaintiff spell[ed] out an abuse of process." *Board of Educ. of Farming Union Free School Dist.* v. *Farmingdale Classroom Teachers Association, Inc., Local 1889, AFT AFL–CIO*, 343 N.E.2d 278 (N.Y. 1975). In *Farmingdale*, a teacher's association had issued subpoenas to 87 teachers to compel their appearance as witnesses at a hearing. *Id.* at 280. When the school district requested that most teachers be excused and that staggered hearing dates be set for the remaining teachers, the teacher's association refused, forcing the district to hire 77 substitute teachers. *Id.* The court of Appeals for New York found these allegations supported an inference that the teacher's association had perverted the subpoena process for the purpose of causing the school district economic harm. *Id.* at 283.

may have also had the "incidental" ulterior motive of obtaining the information for Carlin's benefit.

On the basis of the pleadings and in the absence of allegations to the contrary, this Court finds that the postal inspectors invoked the grand jury process for its intended purpose of identifying evidence for submission to the grand jury and that the "ulterior motive" of helping Carlin was not their "immediate purpose," but rather a purpose that developed after the process had been invoked and the grand jury information had been obtained. In *Moore*, the D.C. Circuit expressly held that "identifying the evidence to submit to the grand jury" is protected activity under the FTCA's discretionary function exception. *Moore*, 65 F.3d at 197. In light of this holding and Moore's failure to allege otherwise, this Court finds that the postal inspectors' primary and immediate use or the grand jury process to obtain evidence for submission to the grand jury and to prepare an indictment precludes Moore from basing an abuse of process claim on the postal inspectors' subsequent disclosures of witness testimony and a draft indictment to Carlin. Accepting the allegations in the Complaint as true and drawing all reasonable inferences therefrom, this Court holds that no material fact remains in dispute and that the United States is entitled to judgment on the pleadings as a matter of law with respect to Moore's abuse of process claim under the FTCA. *See* FED. R. CIV. P. 12(c).

III. CONCLUSION

For the reasons given above, the Court will grant in part and deny in part defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement and defendant Valder's

Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement. The Court will grant defendant Valder's Motion for Summary Judgment, and deny as moot Plaintiff's Motion to Clarify the Stay Order of September 16, 1996. The Court will deny defendant Postal Inspectors' Motion for Summary Judgment and permit limited discovery to proceed on plaintiff's *Bivens* claim for retaliatory prosecution against the postal inspectors. Lastly, the Court will grant defendant United States' Motion for Judgment on the Pleadings, and deny as moot its Alternative Motion to Dismiss for Lack of Subject Matter Jurisdiction.

An Order will accompany this Memorandum Opinion.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

February 5, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civil No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civil No. 92CV2288 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Feb. 5, 1998

ORDER

Upon careful consideration of the parties' pending motions, memoranda in support and in opposition, and the entire record, and for the reasons given in the accompanying Memorandum Opinion, it is this 5th day of February, 1998,

ORDERED that defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule

108(h) Statement [# 131] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement [#136] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion for Summary Judgment [#126] be, and hereby is granted; it is further

ORDERED that plaintiff's Motion to Clarify the Stay Order of September 16, 1996, [#125] be, and hereby is, denied as moot; it is further

ORDERED that defendant Postal Inspectors' Motion for Summary Judgment [#103] be, and hereby is, denied; it is further

ORDERED that defendant United States' Motion for Judgment on the Pleadings [#94-1] be, and hereby is granted; it is further

ORDERED that defendant United States' Motion in the Alternative to Dismiss for Lack of Subject Matter Jurisdiction [#94-2] be, and hereby is, denied as moot; it is further

ORDERED that discovery on plaintiff's *Bivens* claim of retaliatory prosecution against the postal inspectors proceed as indicated in this Opinion; and it is further

ORDERED by the Court, *sua sponte*, that plaintiff's *Bivens* claim of retaliatory prosecution against the postal inspectors be, and hereby is, referred to Magistrate Judge Kay for discovery and pretrial. Unless otherwise ordered by this Court, contested preliminary motions within Local Rule 209 will likewise be heard by Magistrate Judge Kay. All other motions will be heard by the Court.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-5341, 93-5343

WILLIAM G. MOORE, JR., APPELLANT

v.

JOSEPH B. VALDER, ET AL., APPELLEES

Argued: Jan. 18, 1995

Decided: Sept. 22, 1995

Before: EDWARDS, Chief Judge; WALD and HENDERSON, Circuit Judges.

KAREN LECRAFT HENDERSON, Circuit Judge:

Appellant William G. Moore, Jr. (Moore) appeals the dismissal of his *Bivens* and Federal Tort Claims Act claims against Assistant United States Attorney Joseph B. Valder (Valder), six United States Postal Service Inspectors (postal inspectors)[1] and the United States. Moore sued for injuries allegedly caused by Valder's and the postal inspectors' malicious and retaliatory prosecution of him. We affirm in part and reverse in part.

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[1] The postal inspector defendants-appellees are Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins.

I.

Moore was indicted in October 1988 on various counts of theft and fraud. Moore was chairman, president and chief executive officer of Recognition Equipment Incorporated (REI), a company interested in supplying the U.S. Postal Service (USPS) with address-scanning equipment. The indictment charged that Moore and Robert Reedy, another REI employee, engaged in a scheme to defraud the federal government by persuading William Spartin to recommend for the position of United States Postmaster General a candidate who favored using REI's address-scanning equipment. Spartin was both president of Gnau & Associates, Inc. (GAI), a consulting firm hired by REI, and president of a subsidiary of an executive search firm hired by the USPS to identify a qualified candidate to serve as Postmaster General. The indictment also accused Moore and Reedy of participating in a scheme by which GAI employees paid money to Peter E. Voss, a member of the USPS Board of Governors, in return for Voss's steering business to GAI and its clients. REI had hired GAI at the suggestion of Voss. Five co-conspirators, including Voss and John R. Gnau, Jr., the principal of GAI, either pleaded guilty or testified about the fraud pursuant to a grant of immunity.

In November 1989, at the close of the government's case in Moore's criminal non-jury trial, the district court granted Moore's motion for a judgment of acquittal. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989). The district court found insufficient evidence to support a reasonable inference that Moore and Reedy knew of either scheme. *Id.* Moore then filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and

the postal inspectors, asserting a *Bivens*[2] cause of action for malicious prosecution (malicious prosecution claim) and a *Bivens* claim for prosecution in retaliation for the exercise of his first amendment right (retaliatory prosecution claim).[3] Moore later filed a second complaint in the Northern District of Texas seeking recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, for the same alleged injuries.

In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high- profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that

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[2] *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (recognizing a cause of action for damages against officials who violate constitutional or statutory rights under color of federal law).

[3] The complaint also asserted other constitutional and common-law tort claims which were dismissed by the district court. Moore does not appeal the dismissal of those claims.

they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third parties; and that Valder withheld material exculpatory information from Moore after indictment.

The district court dismissed the *Bivens* claims against Valder, holding that he was protected by absolute immunity. The court denied the postal inspectors' motion to dismiss the *Bivens* claims against them on the ground of qualified immunity and then transferred the remaining claims to the U.S. District Court for the District of Columbia, concluding that it lacked in personam jurisdiction. The FTCA complaint was also transferred and the parties stipulated to the consolidation of the two cases by the district court here.

The district court first denied Moore's motion to return the complaints to the Northern District of Texas. The court then dismissed the *Bivens* claims against the postal inspectors because Moore's complaint did not recite direct evidence of their alleged unconstitutional motive and therefore did not satisfy a heightened pleading standard. The court also dismissed the FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's discretionary function exception.

II.

On appeal Moore contends that Valder is not entitled to absolute immunity; that the court erred in applying a heightened pleading standard to his *Bivens* complaint; and that the FTCA's discretionary function exception does not preserve the United States's sovereign immunity from liability for the alleged misconduct. In analyzing his claims, we group the specific misconduct

alleged by Moore into four categories: pressuring witnesses into incriminating Moore; concealing and distorting exculpatory evidence to create misleading or incomplete witness accounts of what Moore knew about the alleged fraud;[4] withholding material exculpatory information from Moore after indictment; and disclosing grand jury testimony to unauthorized third parties.

A. *Claims Against Valder*

The district court dismissed Moore's *Bivens* claims against Valder, holding that Valder was protected by absolute immunity.[5] We review *de novo* a dismissal for failure to state a claim upon which relief can be granted but accept the facts as alleged in the complaint. *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276, 1273 (D.C. Cir. 1994). We hold that absolute immunity shields Valder from liability for the decision to prosecute Moore and for some, but not all, of the other alleged instances of misconduct.

In several decisions the Supreme Court has considered whether and to what extent a state or local prosecutor *qua* prosecutor is immune from liability

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[4] We do not read Moore's complaint to allege that Valder or the postal inspectors *manufactured* false evidence to incriminate Moore. The complaint, construed favorably to Moore, alleges only that the written witness statements, prepared by Valder and the postal inspectors and submitted to the grand jury, created false impressions because they omitted important exculpatory testimony. Joint Appendix (JA) 377-78.

[5] According to the district court, "Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder were prosecutorial functions. . . ." JA 340.

under 42 U.S.C. § 1983. As the Court has recognized, the law of immunity in a *Bivens* claim against a federal official mirrors that in a section 1983 claim against a state official. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909-10, 57 L. Ed. 2d 895 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"); *see also Briggs* v. *Goodwin*, 569 F.2d 10, 17-18 n.8 (D.C. Cir. 1977) ("*[A]ssuming* the rule of *Bivens* comprehends a damage action for a particular constitutional infringement by a federal officer, the federally-determined immunity applicable in such a case should be no different from the federally-determined immunity available in a § 1983 suit against a state official.") (emphasis original). Accordingly, we look to those decisions for guidance.

In *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held that a prosecutor enjoys absolute immunity from section 1983 liability when he acts "as an advocate" by engaging in activities "intimately associated with the judicial phase of the criminal process." *Id.* at 430, 96 S. Ct. at 995. As the Court in *Imbler* noted, the common law afforded absolute immunity to prosecutors for several reasons. Immunity encourages vigorous decisionmaking by reducing, if not eliminating, liability's inhibitory effect, *id.* at 424-25, 96 S. Ct. at 992-93; it protects prosecutors against having "to answer in court each time [a defendant] charge[s] him with wrongdoing [which diverts] his energy and attention . . . from the pressing duty of enforcing the criminal law," *id.* at 425, 96 S. Ct. at 992; and it ensures that judges are not influenced "by even the subconscious knowledge that a post-trial decision in

favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427, 96 S. Ct. at 993. Alternative mechanisms, such as the trial judge's remedial powers, appellate review and post-conviction collateral remedies, exist to remedy injury caused by prosecutorial misconduct. *Id.* In addition, there are alternative ways to deter and punish prosecutorial misconduct, such as subjecting the prosecutor to criminal prosecution or professional discipline. *Id.* at 429, 96 S. Ct. at 994.

The Court in *Imbler* held that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424, 96 S. Ct. at 992. At a minimum, advocatory conduct includes "initiating a prosecution" and "presenting the State's case." *Id.* at 431, 96 S. Ct. at 995-96.[6] Recognizing that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," the Court acknowledged that distinguishing between action taken as an advocate and action taken as an administrator or investigator "may present difficult questions." *Id.* at 431 n.33, 96 S. Ct. at 996 n.33.

The line between advocatory conduct and administrative or investigative activity was refined in *Burns* v. *Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547

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[6] Additionally, "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present" are advocatory decisions. *Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. at 996 n.33.

(1991). Using a "functional approach," the Court emphasized that lower courts must look at the nature of the function performed, not the identity of the person performing it, to determine if a prosecutor is clothed with absolute immunity. The prosecutor must establish that the *conduct* under review was advocatory in nature. *Id.* at 486, 111 S. Ct. at 1939. The Court held that participation in a probable cause hearing ("appearing before a judge and presenting evidence in support of a motion for a search warrant") is protected by absolute immunity but giving legal advice to police officers is not. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494, 111 S. Ct. at 1943-44. The Court warned that "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Id.* at 495, 111 S. Ct. at 1944.

Most recently, the Court discussed the scope of absolute prosecutorial immunity in *Buckley* v. *Fitzsimmons*, —U.S. —, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). There, the Court reaffirmed that "as the function test of *Imbler* recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Id.* at ——, 113 S. Ct. at 2615. Advocatory conduct protected by absolute immunity "include[s] the professional evaluation of the evidence assembled by the police and appropriate pre-

paration for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* But when a prosecutor "performs the investigative functions normally performed by a detective or police officer," he is entitled only to the qualified immunity that the detective or police officer enjoys. *Id.* at ——, 113 S. Ct. at 2616-17.

In *Buckley*, the petitioner alleged that the prosecutors fabricated evidence during the preliminary investigation of a crime and made false statements at a press conference announcing the indictment of the petitioner. The Court held that the prosecutors did not have absolute immunity from liability for the alleged fabrication of evidence because they did not have probable cause to arrest or to initiate judicial proceedings. *Id.* at ——, 113 S. Ct. at 2616. "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* The Court emphasized that the alleged fabrication occurred before a grand jury was convened and that when the grand jury eventually was convened, "its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* The Court also held that a prosecutor is not absolutely immune from liability for making allegedly false statements to the press because statements to the media "have no functional tie to the judicial process." *Id.* at ——, 113 S. Ct. at 2618.

Applying these holdings here, we conclude that Valder's prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to

prosecute Moore. His prosecutorial immunity also protects Valder from liability for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes. Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of "initiating a prosecution" and "presenting the State's case." *Imbler*, 424 U.S. at 431, 96 S. Ct. at 996; *see also Hill* v. *City of New York*, 45 F.3d 653, 661-62 (2d Cir. 1995) (holding absolute immunity protects prosecutor from liability for withholding exculpatory evidence from grand jury). In addition, withholding after indictment information that is subject to disclosure under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is advocatory. In *Imbler*, the prosecutor was alleged to have knowingly used false testimony and suppressed material exculpatory evidence at trial. The Court upheld the lower courts' rulings that the prosecutor was absolutely immune from potential liability for the alleged misconduct. As other courts have recognized, it follows from *Imbler* that the failure, be it knowing or inadvertent, to disclose material exculpatory evidence before trial also falls within the protection afforded by absolute prosecutorial immunity. *See Hill*, 45 F.3d at 662 (holding failure to turn over *Brady* material "after prosecutorial phase" of case had begun was covered by absolute prosecutorial immunity); *Carter* v. *Burch*, 34 F.3d 257, 262 (4th Cir. 1994) (holding absolute immunity protects prosecutor from liability for failing to give defense counsel materially exculpatory evidence).

Vander, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution. *See, e.g., Barbera* v. *Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (holding "*acquiring* evidence which might be used in a prosecution," in contradistinction to "*organization, evaluation*, and *marshalling*" of such evidence, is activity of "police nature" and is therefore not entitled to absolute protection) (emphasis original). "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley*, — U.S. at —, 113 S. Ct. at 2616 (quoting *Hampton* v. *Chicago*, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S. Ct. 1413, 1414, 39 L. Ed. 2d 471 (1974)).[7]

Finally, disclosing grand jury testimony to unauthorized third parties is not advocatory because it

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[7] And as the Supreme Court explained:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial. . . . When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.

Buckley, — U.S. at — , 113 S. Ct. at 2617.

has no functional tie to the judicial process—it does not contribute to the government's case before a grand or petit jury. Like making statements at a press conference, unauthorized disclosure "does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Buckley*, 509 U.S. at ——, 113 S. Ct. at 2618.[8]

B. *Claims Against the Postal Inspectors*

The district court dismissed Moore's claims against the postal inspectors because Moore's complaint did not allege direct evidence that they acted maliciously or in retaliation for constitutionally protected speech. Reviewing the dismissal *de novo* and taking the facts as alleged in Moore's complaint, *Kowal*, 16 F.3d at 1276, 1273, we affirm the dismissal of the malicious prosecution claim but hold that the district court erred in dismissing Moore's retaliatory prosecution claim.[9]

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[8] While we conclude that absolute immunity does not protect Valder, he of course would be entitled to any qualified immunity available to the postal inspectors. Qualified immunity protects a government official who performs discretionary functions from liability for civil damages if he can show that his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).

[9] As an initial matter, we reject Moore's argument that the district court here was precluded from reconsidering the Texas district judge's conclusion that Moore had "asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief." JA 343-44. We first observe that the Texas district judge should not have ruled on the immunity issue because he found that he lacked personal jurisdiction over

The district court did not address whether Moore's *Bivens* claims alleged the violation of clearly established law.[10] The court, therefore, "erred in deciding the heightened pleading issue before deciding the *threshold* 'essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.'" *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (emphasis original)). Furthermore, it has not been clearly established that malicious prosecution violates any constitutional or statutory right.[11] Accordingly, the postal

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the postal inspectors. More importantly, we iterate that the district court below is bound to follow the law of *this* circuit. *See, e.g., 1B Moore's Federal Practice* ("The district courts owe obedience, each to the court of appeals in its own circuit. It may happen, therefore, that a decision in the transferor court is in accordance with the view of the law as established by the court of appeals in its own circuit, but in the transferee circuit the law is either unsettled, or settled to the contrary. . . . If the issue has been settled . . . the transferee court finds itself suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the transferee court would invite reversal if it did not follow the decisions of its own court of appeals.").

[10] The parties appear to agree that prosecution in retaliation for speech protected by the first amendment violates a clearly established right. *See infra* note 12. Although the parties disputed whether the malicious prosecution claim survived the qualified immunity defense, the district court expressly found that it "need not address the question" because of its ruling that Moore's allegations were otherwise deficient. JA 355.

[11] *See Sami* v. *United States*, 617 F.2d 755, 773 (D.C. Cir. 1979) (citing with approval cases holding that "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation"); *see also McLaughlin* v. *Alban*, 775 F.2d 389, 392 (D.C. Cir. 1985) (concluding that plaintiff must "show not

inspectors' qualified immunity defeats Moore's malicious prosecution claim. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. Moore's *retaliatory* prosecution claim, however, does allege the violation of clearly established law.[12]

In publicly criticizing the USPS Moore unquestionably exercised his first amendment rights. Record evidence manifests that the criticism produced hostility in USPS management. Joint Appendix (JA) 154-156, 283. Two of the postal inspectors, who reported to

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merely a mistaken prosecution or even a common law tort, but the violation of a constitutional right" to establish section 1983 claim); *Torres* v. *Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990) (holding section 1983 provides remedy only if plaintiff proves elements of malicious prosecution under state law and establishes that misuse of the legal proceedings was so egregious that he suffered deprivation of rights secured by fourteenth amendment) (citations omitted).

[12] *See, e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1255-57 (D.C. Cir. 1987) (agreeing that "retaliatory prosecution [allegedly initiated solely because plaintiff refused to release civil claims of police misconduct against arresting officers] constitutes actionable First Amendment wrong"); *see also Norwell* v. *Cincinnati*, 414 U.S. 14, 16, 94 S. Ct. 187, 188, 38 L. Ed. 2d 170 (1973) (per curiam) (finding first amendment violation in retaliatory prosecution for "nonprovocatively voicing [] objection" to police conduct); *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.") (quoting *Matzker* v. *Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984)); *Magnotti* v. *Kuntz*, 918 F.2d 364, 368 (2d Cir. 1990) ("It is undisputed that retaliatory prosecution may expose a state official to section 1983 damages."); *Losch* v. *Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983.") (citing *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979)).

USPS management, heard and did not repudiate Valder's declaration that Moore's innocence was irrelevant to the prosecution he intended to pursue. JA 32. These facts taken together constitute evidence sufficient to meet any applicable heightened pleading standard[13] and, accordingly, we remand Moore's retaliatory prosecution claim against the postal inspectors.

C. *Claims Against the United States*

The district court dismissed Moore's FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's "discretionary function" exception. We review the dismissal *de novo* but construe Moore's allegations in his favor. *Hohri* v. *United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987).[14] We hold that only some of the alleged misconduct is covered by the exception.

The FTCA waives the sovereign immunity of the United States from suits for negligent or wrongful acts of government employees subject to certain exceptions. *See* 28 U.S.C. §§ 2671-2680. The "discretionary function" exception protects the federal government from liability for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

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[13] In *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994), we explained this circuit's two-level heightened pleading standard.

[14] Because we accept Moore's version of the facts, we reject his argument that the district court should not have decided whether the discretionary function exception applied without permitting Moore an opportunity to conduct discovery and develop a "concrete record."

agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "preserves the preexisting cloak of governmental immunity for some category of activities." *Gray* v. *Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1593, 80 L. Ed. 2d 125 (1984). We "must examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." *Id.* at 515. But where the "allegation of improper investigatory conduct is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury," the discretionary function applies and preserves governmental immunity. *Id.* at 516.

Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is "exculpatory" and "material" and therefore must be disclosed pursuant to a *Brady* request[15] are actions that require the prosecutor to exercise his professional judgment. They are there-

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[15] We recognize that internal regulations of the Department of Justice direct that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." Department of Justice Manual, 9-11.233 (October 1, 1990). Putting aside the question whether this regulation creates any enforceable right, we note that deciding what this regulation requires under a specific set of circumstances is itself a discretionary act.

fore quintessentially discretionary.[16] Accordingly, the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment.

Disclosing grand jury testimony to unauthorized third parties, however, is *not* a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion. Rather, it is a discrete activity, sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable to this allegation. We express no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence.

We therefore affirm in part, reverse in part and remand to the district court for proceedings consistent with this opinion.

So ordered.

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[16] We are guided by our decision in *Gray* where we held that allegations that the defendants "deliberately present[ed] false and misleading evidence to and with[held] exculpatory evidence from the Grand Jury" are within the discretionary function exception because they are "insufficiently separable from the discretionary decision to initiate prosecution." 712 F.2d at 495, 516.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 92-2288 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLANTIFFS

v.

MICHAEL HARTMAN, ET AL., DEFENDANTS

Civ. A. No. 93-0324 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Sept. 24, 1993

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

These two actions against the United States arise from a major criminal investigation and subsequent prosecution carried out by the office of the United States Attorney for the District of Columbia. The plaintiffs allege that the government and its agents intentionally misled a grand jury, concealed exculpatory evidence, intimidated witnesses, and falsified statements in an attempt to convict plaintiff William Moore. The United States has filed motions to dismiss in both cases.

BACKGROUND

In ruling on a motion to dismiss, the Court must treat the allegations of the complaint as true. *Shear* v. *National Rifle Ass'n*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). The facts as set forth in the complaints are as follows: in early 1985, the U.S. Postal Inspection Service began an investigation into possible illegal payments from John Gnau, a consultant, to Peter Voss, then a member of the United States Postal Service Board of Governors. Assistant United States Attorney Joseph Valder eventually came to lead the investigation. Voss, Gnau, and another member of Gnau's consulting firm pled guilty to criminal charges, while other participants in the conspiracy agreed to cooperate in exchange for immunity from prosecution. Compl. (Civil No. 93-0324) at 6-7.

Plaintiff William Moore was at this time chief executive officer of Recognition Equipment, Inc. ("REI"), a corporation that was seeking to obtain a contract with the Postal Service for the sale of multiple-line optical character recognition ("MLOCR") equipment. At the suggestion of Governor Voss, REI had retained Gnau's consulting firm in order to improve REI's chances of obtaining the contract with the Postal Service. *Id.* As the investigation of Voss and Gnau progressed, Valder and the Postal Inspectors allegedly tried to find a way to link Moore to the conspiracy. However, the evidence clearly demonstrated that Moore knew nothing of the conspiracy. In fact, several conspirators told Valder and the Inspectors that they had actively sought to conceal the conspiracy from Moore. *Id.* at 7.

Nevertheless, Valder and the Inspectors allegedly "engaged in unusual, unlawful and unconstitutional

investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted." *Id.* at 8. Valder and the Inspectors are alleged to have presented incomplete witness statements to the grand jury, even though the witnesses themselves had said that the statements were inaccurate. Valder and the Inspectors are alleged to have intimidated witnesses, going so far as to tear up the immunity letter of one witness in his presence while threatening to prosecute his son. Moore also claims that the defendants failed to provide him with exculpatory evidence that should have been disclosed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), evidence including the report of a lie detector test and a witness statement containing exculpatory statements.

On October 6, 1988, a federal grand jury in the District of Columbia issued an indictment naming Moore, REI, and Robert Reedy, an employee of REI. The indictment charged the defendants with one count of conspiracy to defraud the United States, 18 U.S.C. § 371; one count of theft, 18 U.S.C. §§ 2, 1707; one count of receiving stolen property, D.C. Code Ann. §§ 22-3832(a), (c)(1), 22-105; two counts of mail fraud, 18 U.S.C. §§ 2, 1341; and two counts of wire fraud, 18 U.S.C. §§ 2, 1343. The substance of the charges was that the defendants had illegally conspired to influence the Postal Service's decision whether to award a contract to REI. According to the indictment, REI, Moore, and Reedy paid Gnau for lobbying services, and Gnau in turn paid Governor Voss to take illegal actions on REI's behalf. The indictment also alleged that the defendants had hatched a scheme to replace then-

Postmaster General Paul Carlin with a person more sympathetic to REI's interests.

The government presented its case during a six-week bench trial before the Honorable George Revercomb of the United States District Court for the District of Columbia. On November 20, 1989, following the close of the government's evidence, Judge Revercomb granted the defendants' motion for judgment of acquittal on all charges. *See United States* v. *Recognition Equipment, Inc.*, 725 F. Supp. 587 (D.D.C. 1989). In his opinion, Judge Revercomb specifically noted that "no evidence has been presented that REI, Moore, or Reedy knew of this criminal scheme." *Id.* at 590. Nevertheless, as a result of his indictment and prosecution, Moore maintains that his career was seriously compromised and his finances decimated. He was twice fingerprinted and processed by law enforcement officers and briefly jailed. He and his wife allege that they suffered humiliation, physical and mental suffering, and anguish, which required them to undergo medical treatment.

PROCEDURAL HISTORY

A. Civil Action No. 92-2288

On November 19, 1991, Moore and his wife, Blanche K. Moore, filed a complaint in the United States District Court for the Northern District of Texas against Valder and the seven Postal Inspectors who investigated the case against Moore. The complaint sought to recover for various constitutional violations under a *Bivens* theory of liability,[1] as well as for the state common-law torts of slander, defamation, invasion

[1] *See Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

of privacy, false arrest, abuse of process, and malicious prosecution. In response to the assertion of state law claims against Valder and the Inspectors, the Attorney General's designee certified, on February 18, 1992, that all of the claims against the individually named government defendants arose from actions carried out within the scope of their employment. The Texas federal district court then ordered that the United States was to be substituted as the defendant with respect to the state law claims pursuant to 28 U.S.C. § 2679(d)(1). The state law claims against the individual defendants were dismissed with prejudice.

On September 21, 1992, the Texas federal district court issued an order ruling on the defendants' motion to dismiss. The order dismissed all constitutional claims brought by Blanche Moore, all of Moore's constitutional claims against Valder, and several of Moore's constitutional claims against the Inspectors. The Texas court refused, however, to grant the defendants' motion to dismiss with respect to Moore's malicious prosecution claim against the Inspectors, as well as the constitutional claim alleging violation of his First Amendment rights. Moreover, the court also concluded that it lacked personal jurisdiction over the Inspectors and transferred the case rather than dismiss the remaining claims against them. On October 5, 1992, the official record was transferred to this court and docketed as Civil Action No. 92-2288. The defendants moved to dismiss for lack of jurisdiction, to dismiss the Inspectors as defendants, and to vacate the portion of the Texas district court's ruling that permitted claims to go forward against the Inspectors. A motion for entry of default judgment against the United States was also filed.

B. Civil Action No. 93-0324

On October 14, 1992, the plaintiffs filed a second lawsuit in the United States District Court for the Northern District of Texas. This second complaint named only the United States as a defendant, and differed from the first primarily in that (1) it alleged exhaustion of the administrative remedy procedure which is a prerequisite to filing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, and (2) it alleged no cause of action for defamation or for invasion of privacy. On February 16, 1993, the official record was formally transferred to this Court, where it was docketed as Civil Action No. 93-0324. The United States has filed a motion to dismiss for lack of subject matter jurisdiction.

DISCUSSION

A. The *Bivens* Claims Against the Inspectors Do Not Satisfy This Circuit's Heightened Pleading Standard

In ruling on the defendants' motion to dismiss in Civil No. 92-2288, the Texas federal district court declined to dismiss two claims that Moore had brought against the Inspector defendants in their individual capacities: (1) the malicious prosecution claim, and (2) the claim that the Inspectors had violated Moore's First Amendment rights. The defendants argue that these claims should be dismissed because Moore has failed to allege them with sufficient particularity to satisfy this circuit's heightened pleading standard in *Bivens* actions.[2]

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[2] The parties also dispute whether a malicious prosecution claim can rise to the level of a constitutional tort. Normally it does not: "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation." *Sami* v.

The Supreme Court has determined that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982). To this end, the Court of Appeals for this Circuit has developed a heightened pleading standard for *Bivens* claims alleging an unconstitutional motive. A *Bivens* plaintiff may not merely "allege facts consistent with lawful conduct and append a claim of unconstitutional motive," because to permit such a lawsuit to proceed would "impos[e] on officials the very costs and burdens of discovery and trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). Instead,

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

United States, 617 F.2d 755, 773 (D.C. Cir. 1979). Yet if, as Moore argues, his malicious prosecution count does indeed allege a constitutional violation, then his allegations of malice must still meet this circuit's heightened pleading standard for *Bivens* actions. Because the Court has determined that Moore's allegations of malice do not meet this standard, the Court need not address the question of whether his malicious prosecution claim states a cause of action under the Constitution.

Martin v. *D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). To survive the Inspectors' motion to dismiss, therefore, Moore must produce direct evidence showing that the Inspectors acted out of malice. Evidence that merely supports an inference of malice is insufficient.

According to Moore, "[t]he Complaint alleges that the prosecution against Moore was initiated for at least two reasons. First, Moore was being punished for his aggressive lobbying of the USPS and important members of Congress in order to persuade the USPS to adopt REI's MLOCR technology. . . . Second, . . . [they] sought to prosecute Moore for suggesting qualified candidates for the position of Postmaster General." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 17. Moore claims to have offered some six sources of direct evidence to support these allegations: (1) the complaint itself, (2) the indictment in Moore's criminal case, (3) the testimony of Frank Bray at Moore's criminal trial, (4) Judge Revercomb's opinion entering a judgment of acquittal, (5) Moore's own affidavit, and (6) an affidavit executed by William Hittinger, a member of REI's board of directors.

The first five of these sources provide only inferential proof of malice. The complaint, for example, alleges that Moore lobbied Congress and the Postal Service and that he recommended a candidate for the position of Postmaster General. Its strongest allegation of malicious intent, however, is contained in paragraph 16, which alleges that the defendants used unlawful investigative techniques

> with malice and in clear violation of Moore's right to a fair investigation; these activities were done by

> defendants in an attempt to obtain publicity for themselves and seek career advancement; and these unlawful activities were done by defendants in an attempt to "punish" Moore for exercising his constitutionally-protected rights to criticize USPS procurement decisions.

Compl. at 9. This allegation is insufficient under *Martin* because it does not identify facts that would be direct evidence of malicious intent. Such direct evidence might include, for example, specific statements or documents that expressly set forth the defendants' intent. *See, e.g., Hobson* v. *Wilson*, 737 F.2d 1, 10 (D.C. Cir. 1984) (complaint referred to specific memoranda admitting that defendants' express purpose was to disrupt plaintiffs' political activities), *cert. denied*, 470 U.S. 1084 (1985); *see also Earley* v. *Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) (defining "direct evidence" as "evidence which, if believed, would prove the existence of a fact in issue *without inference or presumption*"). Because the complaint does not contain such evidence or offers of proof, it cannot serve to overcome a qualified immunity defense.

Nor do the indictment or Judge Revercomb's opinion advance Moore's case. These documents confirm that Moore lobbied Congress and the Postal Service, but they do not provide direct evidence that he was prosecuted because of his lobbying activities. Bray's testimony and Moore's own affidavit go one step further; they show that animosity existed between some REI employees and some employees of the Postal Service. Bray, for example, testified at trial that there was a "stubborn resistance" at the Postal Service to REI's attempts to promote MLOCR technology, and said he worried that Moore's "aggressive lobbying effort . . .

might alienate the feelings" of some Post Office leaders. Trial Tr. (Ex. E to Appendix to Pls.' Opp'n to Mot. to Dismiss, filed Apr. 14, 1992) at 1718, 1731. According to Moore, the Postal Service had a "personal animus" against him and seemed "determined to exact . . . punitive measures directed at me personally." Aff. of William G. Moore (Ex. B to Appendix to Pls.' Opp'n to Mot. to Dismiss, filed Apr. 14, 1992) at 29-30. Even these statements do not, however, show that this alleged animosity was a motivating factor in the Inspectors' decision to investigate and prosecute Moore. The closest they come is Moore's statement that "I believe that the agents were motivated in large measure by animus towards me and my company born of longstanding conflict between [REI] and various senior managers within the USPS." *Id.* at 1. This sweeping claim relies entirely upon Moore's subjective beliefs and refers to no direct or circumstantial evidence of the defendants' intent. This claim therefore cannot serve to meet the required heightened pleading standard for *Bivens* actions.

Indeed, the only direct evidence of intent that Moore has offered is the Hittinger affidavit. In this affidavit, a member of REI's board of directors describes how he traveled to Washington in 1987 or 1988 in order to testify before a grand jury and had lunch with Valder and two Postal Inspectors on the day of his testimony. During their conversation, "Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not conc[illegible]n him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice." Aff. of William C.

Hittinger (Ex. B to Pls.' Opp'n to Mot. to Dismiss, filed Mar. 5, 1993) at 3. Even this direct evidence, however, cannot save Moore's claims against the Inspectors from dismissal for it provides no evidence of the Inspectors' intent. Nothing in the affidavit suggests that the Inspectors shared Valder's alleged motivations.

Moore has completely failed to offer any direct evidence of malicious intent by the Inspectors. Moore has urged the Court to adopt a less stringent reading of the heightened pleading standard, *i.e.*, a reading set forth in *Kimberlin* v. *Quinlan*, 774 F. Supp. 1 (D.D.C. 1991), *appeal filed*, No. 91-5315 (D.C. Cir. Aug. 30, 1991). *Kimberlin* involved a federal prisoner who alleged that prison officials had placed him in detention to keep him from speaking to the news media about his claims that he had sold marijuana to vice-presidential candidate Dan Quayle. The trial judge in *Kimberlin* examined *Siegert* and other cases dealing with the heightened pleading standard and concluded that "*Siegert* does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions." He then held that the *Bivens* plaintiff did not have to allege direct evidence of intent but could instead survive dismissal with "tangible allegations of concrete facts corroborative of his own subjective version of the events." *Id.* at 6. Moore argues that under this standard his case should proceed to discovery, because he has alleged facts which "raise[] a legitimate inference that someone was out to 'get' Bill Moore." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 19.

The Court declines to follow *Kimberlin*. Moore's allegations, by contrast to those in *Kimberlin*, rely upon questionable logic and create no strong inferences of unconstitutional motive. The chain of inferences Moore has constructed can be summarized as follows: (1) Moore suggested candidates for the office of Postmaster General, (2) he lobbied Congress and the Postal Service to adopt MLOCR technology, (3) his efforts angered some officials at the Postal Service, and (4) Valder and the Inspectors attempted to silence him by pursuing an unwarranted prosecution. Although this scenario is within the realm of possibility, it essentially relies upon a *post hoc ergo propter hoc* theory of causation—because the lobbying came before the prosecution, the lobbying must have caused the prosecution. Moore is unable to explain why the Inspectors would have cared about a private citizen's criticism of Postal Service procurement procedures. Nor does he reveal why the Inspectors would have preferred that the Postal Service use single-line optical character recognition equipment instead of REI's multiple-line equipment. In *Kimberlin*, by contrast, the defendants were high-ranking executive branch officials, appointed during Republican administrations, who might naturally have been intensely interested in the outcome of a presidential election. Indeed, *Kimberlin* showed that the defendants were in close contact with the Quayle campaign, and that their high-level decision to place a single inmate in detention was unprecedented and extraordinary. The court rightly concluded that Kimberlin's allegations were "tangible, detailed, and nonconclusory." 774 F. Supp. at 8. Moore, however, alleges only that the Postal Service bore him animosity and then asks that an inference be drawn that this animosity caused his prosecution. This link is far too

tenuous to satisfy even the standard set forth in *Kimberlin*.

Finally, Moore objects to this Court's review of the Texas court's order which held that Moore had met his pleading burden on his claims against the Inspectors. That order denied the defendants' motion to dismiss the claims, and declared that "[d]iscovery should therefore proceed on both of these claims." Mem. Ord. of Sept 21, 1992 at 10-11. The Court must review this earlier order, however, because the heightened pleading standard for *Bivens* actions in this Circuit is markedly different from the standard in the Fifth Circuit. *Compare Martin* v. *D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (requiring "direct evidence" of malice) with *Elliott* v. *Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (requiring only that a plaintiff "alleg[e] with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."). Furthermore, the Court notes that revision of the Texas court's decision is entirely proper. *See* 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[4.-1] at II-9 to -10 (1993) ("[T]here are innumerable . . . orders and rulings that the district court may make as a case moves from the filing of the complaint to trial and judgment. All of these decisions are interlocutory in character, and remain subject to reconsideration and change at any time until the entry of judgment."); *cf.* Fed. R. Civ. P. 54(b) (providing, as to multiple claim or multiple party cases, that "[i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer

than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). The Texas court did find that it lacked personal jurisdiction over the Inspectors. *See Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."). The Court will accordingly vacate the portion of the Texas court's order that permitted discovery to proceed against the Inspectors and will dismiss the complaint against the Inspectors in Civil No. 92-2288 because Moore has failed to meet the heightened pleading standard for *Bivens* actions.

C. The United States Has Not Waived Its Sovereign Immunity with Respect to Constitutional Torts

Because the Inspectors are the only remaining individual defendants in these two lawsuits, after their dismissal only the claims of Moore and his wife against the United States survive. In Civil No. 92-2288, these claims are limited to the plaintiffs' common law claims for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution. In Civil No. 93-0324, however, the plaintiffs seek recovery for both common law torts and alleged constitutional violations. Counts I, II, and III of the complaint in Civil No. 93-0324 seek damages for malicious prosecution, false arrest, and abuse of process. Counts IV, V, and VI of the complaint seek damages for violations of the First and Fifth Amendments to the United States Constitution.

The FTCA, however, exposes the United States to liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Courts have interpreted this phrase to mean that only claims brought under state law are cognizable under the FTCA. *See, e.g., Meyer* v. *Fidelity Sav.*, 944 F.2d 562, 568 (9th Cir. 1991) ("Because 'the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act.'"). The Court will accordingly dismiss counts IV, V, and VI of the complaint in Civil No. 93-0324, because these counts state constitutional causes of action to which the United States has not waived its sovereign immunity.

D. The Claims Against the United States Are Barred by the Discretionary Function Exception to the Federal Tort Claims Act

The only claims remaining, therefore, are the common law causes of action against the United States. Both lawsuits seek relief on substantially the same grounds; the only difference is that Civil No. 93-0324 alleges satisfaction of the administrative remedy procedure under the FTCA, while Civil No. 92-2288 does not.[3] These grounds, as summarized by the plaintiffs themselves, are allegations that the government

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[3] Failure to exhaust this procedure provides an alternative ground for dismissal of Civil No. 92-2288. *See Mittleman* v. *United States Treasury*, 773 F. Supp. 442, 454 (D.D.C. 1991). Because the claims in the two cases are virtually identical, however, the Court devotes most of its analysis to the discretionary function exception, which applies to both cases.

1. Knowingly concealed evidence that Moore lacked knowledge of the conspiracy;

2. Presented false, incomplete, and misleading witness statements to the grand jury;

3. Refused to allow witnesses to amend these misleading statements after the witnesses pointed out that the statements were inaccurate;

4. Intimidated and harassed witnesses;

5. Falsified records of witness interviews by excluding exculpatory material from them; and

6. Withheld and possibly destroyed exculpatory evidence that should have been disclosed to Moore under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

See Pls.' Opp'n to Mot. to Dismiss at 7-8. The government contends that claims arising from these actions are barred by the discretionary function exception to the FTCA.

The FTCA waives the United States' sovereign immunity from suits for negligent or wrongful acts of Government employees, subject to certain exceptions set forth in 28 U.S.C. § 2680. The "discretionary function" exception provides that the government is not liable for

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

> Government, whether or not the discretion involved be abused.

Id. § 2680(a). In *Gray* v. *Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the court held that decisions to initiate prosecution are "quintessential examples of governmental discretion" and are therefore immune under this exception. *Id.* at 513. With respect to allegations of illegal pre-indictment conduct, courts are cautioned to "examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." *Id.* at 515. Although the plaintiffs seek to recover for many alleged instances of misconduct, their claims fall into three categories: (1) those relating to the presentation of evidence to the grand jury, (2) those claiming that the government failed to disclose *Brady* material, and (3) those alleging that the government harassed and intimidated witnesses. Each of these actions, however, is closely linked to the exercise of prosecutorial discretion.

The court in *Gray* expressly identified "the presentation of evidence to the Grand Jury" as involving the sort of "purely discretionary decisions" that § 2680(a) was intended to protect. 712 F.2d at 515-16. The plaintiffs claim, nevertheless, that the government should be held liable for failing to present exculpatory evidence to the grand jury.[4] The Court notes first that

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[4] The plaintiffs also allege that the government "falsified" evidence. Pls.' Opp'n to Mot. to Dismiss at 8. A review of the complaint, however, shows that this alleged falsification did not involve the actual fabrication of evidence, but instead merely refers to the government's failure to include exculpatory evidence in witnesses'

in *United States* v. *Williams*, 112 S. Ct. 1735, 1744-46 (1992), the Supreme Court held that the government is under no duty whatsoever to present exculpatory evidence to a grand jury. In deciding *Williams* the Court overruled a number of contrary holdings by other federal courts, including Judge Revercomb's declaration, in Moore's criminal case, that a prosecutor may not "hide evidence that clearly negates guilt from the grand jury." *United States* v. *Recognition Equipment, Inc.*, 711 F. Supp. 1, 12 (D. D.C. 1989).

More relevant to our inquiry here, however, is the nature of a prosecutor's determination that a given item of evidence is "exculpatory." Judge Revercomb also observed that if prosecutors were forced to justify all their evidentiary decisions, "nearly every indictment would be vulnerable to charges that the prosecutor failed to submit each and every scrap of evidence, circumstantial or direct, that arguably could have worked in favor of the defendant." *Id.* at 11-12. This is precisely the sort of conduct that the discretionary function exception to the FTCA was intended to prevent. Exculpatory evidence does not come labeled as such. Instead, the decision whether to submit evidence to a grand jury on the grounds that it is "exculpatory" calls invariably for an exercise of discretionary judgment rooted in policy concerns. Such decisions are therefore inextricably "intertwined with purely discretionary decisions of the prosecutors," *Gray*, 712 F.2d at 515, and

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statements—the same conduct of which the plaintiffs complain elsewhere. Thus, all of the plaintiffs' claims relating to the presentation of evidence implicate the prosecutor's discretion to determine what evidence is exculpatory and what evidence is not.

cannot form the basis of a cause of action against the United States.[5]

The plaintiffs' claim that the government should be held liable for failing to disclose *Brady* material must be rejected for the same reason. In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a prosecutor has a duty to disclose, upon request, all exculpatory evidence which is material either to guilt or to punishment. Although courts have reviewed evidence in the criminal context to determine whether it falls within the scope of *Brady*, this does not mean that they can or should do so in the context of a civil tort action. No mechanical formula exists for determining whether evidence is exculpatory. Government agents would be hampered in their decisionmaking if the government could be held liable because they made a faulty "judgment call." Congress created the discretionary function exception in recognition of this fact.

Finally, the plaintiffs' allegation that the government "intimidated and harassed witnesses" also implicates actions that are closely linked to prosecutorial discretion. The conduct to which the plaintiffs refer here is the government's alleged attempt to "coerce incrimi-

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[5] The plaintiffs argue that the decision whether to disclose exculpatory evidence was not discretionary because the *United States Attorneys' Manual* states that a "prosecutor must . . . disclose such evidence to the grand jury." The plaintiffs argue that this creates a mandatory duty, and that the discretionary function exception therefore does not apply. *See Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). This argument, however, ignores the plain declaration in the *Manual* itself that the *Manual* "provides only internal Department of Justice guidance" and "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *See* Appendix A to Defs.' Reply.

nating testimony" from a witness by tearing up his immunity letter in front of his face and by threatening to prosecute his son. *See* Compl. (Civil No. 93-0324) at 10-11. In *Gray*, however, the Court of Appeals established that "[p]rosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception." 712 F.2d at 513. To hold the government liable because it threatened to prosecute a witness's son would be to second-guess its decision about "whether, when and against whom to initiate prosecution," a decision that is clearly committed to its sole discretion. Similarly, the decision whether to grant or deny immunity to a witness is also closely linked to the decision whether to prosecute that witness. Whether these decisions were made with malicious intent is irrelevant, as § 2680(a) preserves the government's sovereign immunity "whether or not the discretion involved be abused." Thus, neither of these actions can support a claim for damages against the United States.[6]

The discretionary function exception thus exempts the United States from liability for all the common law claims alleged in both of the plaintiffs' lawsuits. Having

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[6] The plaintiffs also argue that *Gray* does not apply to the Postal Inspectors' actions independent of the actions of prosecutor Valder. *See* Pls.' Opp'n to Mot. to Dismiss at 19-21. The relevant inquiry, however, is not which federal official carries out a given action, but whether the action implicates a discretionary function. Furthermore, *Gray* clearly provides that the discretionary function exception applies "no matter whether the challenged decisions are made during the investigation or prosecution of offenses." 712 F.2d at 516.

concluded that the *Bivens* claims against the Inspectors and the constitutional claims against the United States must also be dismissed, the Court will accordingly enter an order dismissing both Civil No. 92-2288 and Civil No. 93-0324. All other pending motions in this case will be denied as moot. An appropriate order will issue.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLANTIFFS

v.

MICHAEL HARTMAN, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Sept. 24, 1993

ORDER

For the reasons set forth in the memorandum opinion issued on this date, it is this 24th day of September, 1993,

ORDERED that the motions of the United States to dismiss for lack of jurisdiction in Civil No. 92-2288 and in Civil No. 93-0324 be, and hereby are, granted; it is further

ORDERED that the motion of the Inspector Defendants to dismiss in Civil No. 92-2288 be, and hereby is granted; it is further

ORDERED that all other pending motions in these consolidated cases be, and hereby are, denied as moot; and it is further

ORDERED that these consolidated cases be, and hereby are, dismissed.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:91-CV-2491-G

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Filed: Sept. 21, 1992

MEMORANDUM ORDER

Before the court is the motion of defendants Joseph B. Valder ("Valder"), Michael Hartman ("Hartman"), Frank Korman ("Korman"), Robert Edwards ("Edwards"), Pierce McIntosh ("McIntosh"), Daniel Harrington ("Harrington"), Norma Robbins ("Robbins"), other unnamed defendants, and the United States of America ("the government") (collectively "defendants") to dismiss the complaint of plaintiffs William G. Moore, Jr. ("Moore") and Blanche K. Moore ("Mrs. Moore") (collectively "plaintiffs") for failure to state a claim upon which relief can be granted, lack of personal jurisdiction, and improper venue. For the reasons stated below, the motion to dismiss all constitutional claims brought by Mrs. Moore against the defendants is granted; the motion to dismiss Moore's constitutional

claims against Valder is granted; the motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins, and other unnamed defendants is granted as to the fifth amendment/fair and impartial grand jury claim, but is denied as to the malicious prosecution and first amendment claims; and while there is merit in the motion to dismiss for lack of personal jurisdiction those claims which remain in the case, the court has elected to transfer, rather than dismiss, those claims.[1]

I. *BACKGROUND*

On November 19, 1991, the plaintiffs sued the defendants—an Assistant United States Attorney (Valder) and a number of present and former employees of the United States Postal Service (Hartmann, Kormann, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants)—for $30 million in damages allegedly caused by their misconduct during the criminal investigation, and subsequent prosecution, of Moore —formerly the Chairman, President, and Chief Executive Officer of Recognition Equipment Incorporated.[2]

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[1] Plaintiffs' common law claims against the individual defendants for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution were dismissed with prejudice and are now being brought solely against the United States, as contemplated by 28 U.S.C. § 2679(d)(1). *Moore* v. *Valder, et al.*, 3-92-CV-2491-G (N.D. Tex. June 29, 1992) (order granting substitution of United States for individual defendants as to common law claims). The motion at issue here did not address these claims against the United States, and this court accordingly intimates no opinion concerning them. They will be transferred, however, to the District of Columbia so that all remaining claims may be adjudicated in one forum.

[2] *See United States* v. *Recognition Equipment, Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

Plaintiffs contend that the defendants engaged in a pattern of tactics designed to mislead and abuse the grand jury process and to deprive both of them of constitutional rights. Specifically, plaintiffs have asserted constitutional claims against the defendants under the first, fourth and fifth amendments. On this motion, defendants maintain that (1) the court lacks in *in personam* jurisdiction over them; (2) venue is improper in this court; (3) the rights claimed by plaintiffs are not protected by the United States Constitution; (4) even if the claims asserted by Moore are of constitutional dimension, Mrs. Moore does not have a right of action cognizable under the Constitution; (5) the individual defendants are entitled to absolute immunity from suit; and (6) in the event the defendants are not absolutely immune from suit, they are nevertheless entitled to qualified immunity.

III. *ANALYSIS*

A. *Failure To State A Claim*

1. *Legal Standard*

A complaint need only recite a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). The Federal Rules of Civil Procedure do not require factual pleading; plaintiffs may proffer general pleadings and defendants may discover the precise factual basis for the claims through liberal pretrial discovery procedures. *Morrison* v. *City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985). A motion under Rule 12(b)(6) should be granted, however, only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims that would entitle them

to relief. *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded facts in the complaint and construe the complaint liberally in favor of the plaintiffs. *Abdul-Alim Amin* v. *Universal Life Insurance Company of Memphis, Tennessee*, 706 F.2d 638, 640 (5th Cir. 1983). The court should also give the plaintiffs an opportunity to amend their complaint rather than dismiss if it appears that a more carefully drafted complaint might state a claim upon which relief may be granted. *Friedlander* v. *Nims*, 755 F.2d 810, 813 (11th Cir. 1985). *See also Dussouy* v. *Gulf Coast Investment Corporation*, 660 F.2d 594, 604 (5th Cir. 1981); *Sarter* v. *Mays*, 491 F.2d 675, 676 (5th Cir. 1974).

The court need not, however, assume facts that the plaintiffs have failed to allege. *Campbell*, above, 781 F.2d at 443. Nor must the court accept as true allegations which are wholly conclusory or which fail to set forth acts that, if proved, would warrant the relief sought. Dismissal of claims founded on such allegations is proper. *Davidson* v. *State of Georgia*, 622 F.2d 895, 897 (5th Cir. 1980).

2. *Standing of Mrs. Moore*

As a preliminary matter, the court agrees with the defendants that Mrs. Moore lacks standing to assert constitutional claims against them under the first and fifth amendments.[3] The Supreme Court has con-

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[3] Plaintiffs also alleged a fourth amendment claim, but they failed to respond to defendants' motion to dismiss that claim. Because the court is persuaded by defendants' arguments that the fourth amendment claim should be dismissed, and because plaintiff's failure to respond may fairly be deemed an abandonment

sistently held that rights under the first, fourth, and fifth amendments are personal and may not be vicariously asserted. *See, e.g., Rakas* v. *Illinois*, 439 U.S. 128, 133-34 (1978) (fourth amendment); *United States* v. *White*, 322 U.S. 694, 698 (1944) (fifth amendment). In response to the defendant's assertions, the plaintiffs present merely conclusory allegations —offering neither case law to refute the defendants' arguments nor facts to demonstrate that the government violated Mrs. Moore's constitutional rights. Because Mrs. Moore lacks standing, her constitutional claims must be dimissed.

3. *Immunity of Defendants*

a. *Valder*

The plaintiffs allege that Valder, in his capacity as an assistant U.S. attorney conducting a criminal investigation and subsequent prosecution, violated Moore's constitutional rights under the first and fifth amendments of the U.S. Constitution. A prosecutor enjoys absolute immunity from personal liability for his conduct "in initiating a prosecution and in presenting the [Government's] case." *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976). Where the actions giving rise to the claim for damages involve the prosecutor's role as an advocate, the prosecutor is immune from suit. *See Burns* v. *Reed*, ___U.S. ___, ___, 111 S. Ct. 1934, 1942 (1991); *Imbler*, 424 U.S. at 430-31. Absolute immunity extends to the conduct of prosecutors in presenting cases to grand juries. *Morrison* v. *City of Baton Rouge*, above, 761 F.2d at 246-49. Activity prior to the pres-

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of that claim, this opinion will discuss only plaintiff's first and fifth amendment claims.

entation of a case to the grand jury, including the interviewing of witnesses who will testify before the grand jury, is advocatory in nature, and as such, immunized from suit. *See Morrison*, above, 761 F.2d at 248; *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980). Even prosecutorial misconduct committed *maliciously or in bad faith* is protected by absolute immunity. *See, e.g., Brummett* v. *Camble*, 946 F.2d 1178, 1181 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2323 (1992); *Morrison*, 761 F.2d at 248. Absolute immunity is justified and defined by the governmental functions it protects and serves, not by the *motives* with which a particular officer performs those functions. *Brummett*, 946 F.2d at 1181.

According to Moore, Valder, in his relentless pursuit of Moore's indictment, "(1) tore up an immunity letter; (2) threatened a key witness with the prosecution of his son; (3) flew to Dallas to investigate the case; . . . (4) destroyed *Brady* material and made misrepresentations to the Court regarding the existence of *Brady* material"[4]; provided the other defendants with legal advice[5]; and (6) prosecuted Moore, in part, because Moore was publicly critical of the United States Postal Service ("USPS").[6] Such prosecutorial behavior, Moore contends, falls outside Valder's quasi-judicial role and should be considered investigatory or administrative in nature.

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[4] Plaintiffs' Surreply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (May 27, 1992) at 18.

[5] Plaintiff's Response to Defendants' Motion to Dismiss (April 14, 1992) at 32-33.

[6] Original Complaint ¶ 16; Plaintiff's Response, n.5 above, at 29.

Giving full weight to Moore's allegations, the court nevertheless concludes that Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder wer prosecutorial functions—regardless of his motives, malice, or bad faith. Under clear circuit precedent, Valder was, at all times material here, acting as a prosecutor, and he is therefore personally immune from liability on these claims.[7] All remaining claims[8] against Valder are accordingly dismissed.

b. Postal Inspectors Hartman, Kormann, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants ("Postal Service Employees")

The court agrees with Moore that the defendant postal service employees are not clothed with a derivative immunity that would make them absolutely immune from suit. *See Malley* v. *Briggs*, 475 U.S. 335, 340-44 (1986) (police officers); *Harlow* v. *Fitzgerald*, 457 US. 800, 810-11 (1982) (presidential aides). The court concludes, however, that the postal service employees may assert qualified immunity from suit on those claims, and issue which is addressed below.

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[7] Plaintiffs themselves recognize that "prosecutional [sic] immunity may be difficult to overcome" in this case, Plaintiffs' Surreply at 18, and that this circuit "has taken a rather expansive view of the scope of prosecutorial immunity." Plaintiffs' Response at 32.

[8] The nonconstitutional claims have already been dismissed. *See* note 1, above.

(i) *Fifth Amendment/Due Process/Grand Jury Claim*

Qualified immunity shields government officials performing discretionary functions from liability for civil damages if their actions could reasonably have been considered consistent with the rights they are alleged to have violated. This doctrine affords an "*immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). The court must assess the objective legal reasonableness of their actions, in light of the rules that were clearly established at the time. The contours of Moore's rights must have been clear enough for a reasonable official to have understood that he was violating those rights. Thus, in light of the preexisting law, the unlawfulness of the defendants' acts must have been apparent. *Anderson* v. *Creighton*, 483 U.S. 635, 638-40 (1987); *Matherne* v. *Wilson*, 851 F.2d 752, 756-57 (5th Cir. 1988); *Hodorowski* v. *Ray*, 844 F.2d 1210, 1216-17 (5th Cir. 1988). The court must measure the "law's certainty" against "an objectively reasonable view of the facts facing an official." *Matherne*, 851 F.2d at 756. A balance must be struck between the interests of vindicating citizens' constitutional rights and of public officials' ability to effectively perform their duties. This balance is destroyed if officials cannot reasonably anticipate when their conduct may give rise to liability for damages. *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Therefore, to overcome defendants' qualified immunity defense, Moore must show that no reasonable postal inspector could have believed that the conduct complained of was lawful.

Moore alleges that the postal service employees engaged in a pattern of tactics designed to mislead and

abuse the grand jury process and to deprive him of his fifth amendment right to due process and to informed, fair, and impartial grand jury. All of these alleged acts arose out of the defendants' conduct in the preparation of evidence—both exculpatory and otherwise—for presentation to a grand jury. As defendants pointed out,[9] courts have disagreed in the past as to the conduct required of government officials when collecting and preparing evidence to place before a *grand jury*. Recently, in *United States* v. *Williams*, ___ U.S. ___, 112 S. Ct. 1735 (1992), the Court held that withholding exculpatory evidence from a grand jury does not violate a criminal defendant's constitutional right to an unbiased and independent grand jury. 112 S. Ct. 1744-45. At the time of the conduct alleged here, the law's uncertainty[10] concerning the procurement and presentation of evidence to the grand *jury* would have made it impossible for a reasonable official to have understood that he was violating Moore's rights. *See Connelly* v. *Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989). As a result, dismissal of Moore's claim of violation of due process and of the right to an informed, fair and impartial grand jury is required. *See Siegert* v. *Gilley*, ___ U.S. ___, ___, 111 S. Ct. 1789, 1793-94 (1991).

(ii) *First Amendment Claim and Malicious Prosecution Claim*

Moore claims that the postal inspectors prosecuted him in retaliation for exercise of his first amendment rights. In addition, he maintains that the postal inspec-

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[9] Defendants' Motion to Dismiss, pp. 9-19.

[10] For the conflict in decision among the circuits, *see United States* v. *Page*, 808 F.2d 723, 727 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987).

tors prosecuted him out of malice or "bad faith." A cause of action under the rubric of "retaliatory prosecution" is properly pled where (1) the plaintiff's conduct is constitutionally protected; and (2) the protected conduct was a motivating factor in the decision to prosecute. *See Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979); *Rackovich* v. *Wade*, 850 F.2d 1180, 1189-90 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988). To succeed on a claim of retaliatory prosecution, Moore must show that the prosecution was motivated in part by the defendants' desire to retaliate against him for exercising his constitutional rights. *See Gates* v. *City of Dallas*, 729 F.2d 343, 345 (5th Cir. 1984). A "bad faith" prosecution is one initiated without probable cause. *See Wheeler* v. *Cosden Oil and Chemical Company*, 734 F.2d 254, 260-61 (5th Cir.), *modified in part, reh'g denied*, 744 F.2d 1131 (1984). To successfully state malicious prosecution claim against a law enforcement official, it is only necessary to plead that the official deliberately provided false and misleading evidence to obtain an indictment. *See Wheeler*, 734 F.2d at 260.

On each of these claims, Moore has met his burden under the rule 12(b)(6) standard. He has asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief. Discovery should therefore proceed on both of these claims.

B. *Personal Jurisdiction*

When nonresident defendants move to dismiss for lack of personal jurisdiction, the plaintiffs bear the burden of establishing the trial court's jurisdiction over

them. *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260, 1270 (5th Cir. 1983). If the district court chooses to decide the matter without an evidentiary hearing, the plaintiffs may meet their burden by presenting a prima facie case for personal jurisdiction. *Id.* at 1270-71. The court will take the allegations of the complaint as true, except where they are controverted by opposing affidavits, and all conflicts in the facts are resolved in favor of the plaintiff. *Thompson* v. *Chrysler Motors Corporation*, 755 F.2d 1162, 1165 (5th Cir. 1985). In making its determinations, the court may consider affidavits, interrogatories, depositions, oral testimony, or any combination of recognized discovery methods. *Id.*; *Stuart* v. *Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).

A federal court may only exercise personal jurisdiction if it is authorized to do so by law and such exercise does not violate the Constitution. In a federal question case in federal court, the relevant constitutional provision is the due process clause of the fifth amendment. *Burstein* v. *State Bar of California*, 693 F.2d 511, 514 (5th Cir. 1982). The law authorizing such service is Rule 4(e), F.R. Civ. P. The second sentence of that rule, authorizing service on non-resident defendants "under the circumstances and in the manner prescribed in the statute," allows resort to a state long-arm statute "only to reach those parties whom a court of the state could also reach under it." *Id.* at 514. *Accord*, *DeMelo*, 711 F.2d at 1266-69; *Point Landing Inc.* v. *Omni Capital International Ltd.*, 795 F.2d 451, 424-27 (5th Cir. 1986) (en banc), *aff'd*, 484 U.S. 97 (1987).[11]

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[11] Most cases deciding the reach of state long-arm statutes have arisen in a diversity context. *Burstein*, *DeMelo*, and *Point Land-*

The Texas long-arm statute authorizes suit agaisnt a non-resident defendant "if the nonresident . . . commits a tort in whole or in part in [Texas]." TEX. CIV. PRACT. & REM. CODE. § 17.042(2) (Vernon 1986). Because this statute has been interpreted to extend to the constitutional limits of due process, *Helicopteros Nacionales de Columbia*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), "a non-resident's amenability to personal jurisdiction under the Texas long-arm statute collapses into a federal-style inquiry as to whether jurisdiction comports with federal constitutional guarantees." *Bullion* v. *Gillespie*, 895 F.2d 213, 215-16 (5th Cir. 1990).

According to the plaintiffs, the individual defendants are subject to the jurisdiction of this court because they committed torts which had foreseeable effects in Texas. The Supreme Court, however, has expressly rejected such a test. *See Burger King Corporation* v. *Rudzewicz*, 471 U.S. 462, 474 (1985) ("[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction") (emphasis in original).

It has also been held, moreover, that where defendants' contact with the forum rests solely on "the mere fortuity that the plaintiff happens to be a resident of the forum," due process requirements are not satisfied. *Southmark Corporation* v. *Life Investors, Inc.*, 851

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ing, by contrast, are federal question cases where the statute presenting the federal question does not authorize nationwide service of process.

F.2d 763, 773 (5th Cir. 1988) (citing *Patterson* v. *Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985)). All that the plaintiffs have shown regarding the individual defendants' contacts with Texas amounts to no more than such a fortuity.

Although the plaintiffs have discussed various contacts some of the individual defendants had with Texas or with Moore in Texas in their official capacities, such contacts cannot serve, in and of themselves, as a basis for obtaining personal jurisdiction over the defendants in their individual capacities. *Stephens* v. *Coleman*, 712 F. Supp. 1571, 1576 (N.D. Ga. 1989) *aff'd*, 901 F.2d 1571, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 555 (1990) ("[p]laintiff has not given sufficient information relative to [defendant] Dunst's activities or contacts as they pertain to plaintiff while on [her official] visits [to Georgia from Washington, D.C.]"). Furthermore, even were sufficient contacts with Texas established, the court would still have to consider the "reasonableness" of maintaining jurisdiction here, *i.e.*, whether the assertion of personal jurisdiction in this court would comport with traditional notions of fair play and substantial justice. *Id.*, 712 F. Supp. at 1576 and 1577 ("reasonableness" factors indicated that records and witnesses were likely located in Washington, D.C., and that "case could be more efficiently handled in that forum"). *See also Edmond* v. *United States Postal Service*, 727 F. Supp. 7, 9-10 (D.D.C. 1989) (Revercomb, J.), a case quite similar factually to this case, in which it was held that a nonresident assistant U.S. attorney was not subject to the jurisdiction of the court.

Plaintiffs have failed to demonstrate that the individual defendants are subject to the jurisdiction of this court. Although the defendant's motion to dismiss

on this ground is meritorious, the court has determined that transfer, rather than dismissal, is the appropriate relief. 28 U.S.C. § 1406(a).

IV. *CONCLUSION*

In summary, defendants' motion to dismiss all constitutional claims brought by Mrs. Moore against the defendants is GRANTED; their motion to dismiss Moore's constitutional claims against Valder is GRANTED; their motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants is GRANTED as to the fifth amendment/due process and fair and impartial grand jury claims but is DENIED as to the malicious prosecution and first amendment claims; and their motion to dismiss for want of personal jurisdiction, though meritorious, will be denied in favor of transfer to the United States District Court for the District of Columbia, a district in which the defendants are, under the plaintiffs' allegations, subject to jurisdiction.

Accordingly, all claims not dismissed by this memorandum order are TRANSFERRED to the United States District Court for the District of Columbia.

SO ORDERED.

September 21, 1992.

/s/ A. JOE FISH
A. JOE FISH
United States District Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5241

WILLIAM G. MOORE, JR., APPELLEE

v.

MICHAEL HARTMAN, ET AL., APPELLANTS

Filed: January 31, 2005

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND,* and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

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* Circuit Judge Garland did not participate in this matter.